No. 93- _____

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Supreme Court of the United States

October Term, 1993

THE RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., THE DELANO VILLAGE COMPANIES, RIVERDALE GARDENS, COLISEUM PARK APARTMENTS CO., and SMALL PROPERTY OWNERS OF NEW YORK,

Petitioners,

-against-

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, ROBERT WELLS, EVERETT QUINTON, GAY MEN'S HEALTH CRISIS, INC., JANET GOODMAN, KAIROS RENCHER, and DISABLED IN ACTION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Under New York State law, rent controlled and rent stabilized apartments have, in limited respects, been subject to succession rules, under which certain defined family members can take over an apartment when the original tenant dies or vacates the unit. In 1989, the State agency which administers this program, vastly expanded the succession to tenancy rules; redefining family members beyond a discrete set of blood and spousal relatives to include persons having a financial and emotional relationship with the tenant. The State's reasons for this redefinition, which significantly reduced the ability of landlords to choose new tenants and to recover vacated apartments, included increasing homelessness, poverty and AIDS. Utilizing an unjustifiably lenient standard of review to judge whether these new rules actually advanced the agency's objectives (in conflict with this Court's decisions) and totally ignoring the fact that landlords bearing the brunt of these rules are not responsible for the problems that they allegedly address, the New York Court of Appeals ruled that these new rules did not constitute a taking of property.

The question presented for review is whether the new succession rules do, in fact, constitute a taking of property, either by regulation or by physical occupation, under the Fifth and Fourteenth Amendments of the United States Constitution.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding. Commissioner Richard L. Higgins has, during the course of this litigation, been succeeded as Commissioner for DHCR; first by Angelo I. Aponte, and, more recently, by Donald M. Halperin.

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In The

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THE RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

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-against-

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

OPINIONS BY THE COURT BELOW

The opinion of the New York State Court of Appeals was issued on December 21, 1993 and is reprinted in the appendix to this petition (App.) at App. A, 1a - 17a. The relevant opinions of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, are reported at 189 A.D.2d 594 (A.D. 1st Dep't 1993) and 164 A.D.2d 283 (A.D. 1st Dep't 1990) and are reprinted in the appendix at App. B & C respectively, 18a - 37a. The opinion of the New York State Supreme Court (Santaella, J.) entered November 27, 1991 is reprinted in the appendix at App. D, 38a - 46a.

JURISDICTION

The decision of the New York State Court of Appeals was issued on December 21, 1993. App. A, 1a - 17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Federal Constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides, in pertinent part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

The statutes, regulations and codes at issue are the New York City Rent Stabilization Code, 9 N.Y.C.R.R. §§ 2520.6(o) and 2523.5(b) and (e) (McKinneys Unconsol. Laws 1987, Supp. 1993); Emergency Tenant Protection Regulations ("ETPR"), 9 N.Y.C.R.R. §§ 2500.2(m) and 2503.5(d) and (e) (McKinneys Unconsol. Laws 1987, Supp. 1993); New York City Rent and Eviction Regulations ("Rent Control"), 9 N.Y.C.R.R. § 2204.6(d) (McKinneys Unconsol. Laws 1987, Supp. 1993); and the New York State Rent and Eviction Regulations, 9 N.Y.C.R.R. § 2104.6(d) (McKinneys Unconsol. Laws 1987, Supp. 1993).

The provisions of the New York City Rent Stabilization Law, Emergency Tenant Protection Regulations, New York State Rent and Eviction Regulations and New York City Rent Stabilization Code which are challenged are

reprinted in the Joint Record on Appeal below at Vol. I, p. 119 - 172, Vol. III, p. 1080 - 1093.

Under the pre-amended New York City Rent Stabilization Code, when a tenant vacated a stabilized apartment, a family member (limited to specified blood relatives and spouse) could obtain a renewal lease only if he/she had resided in the unit as a primary resident from the inception of the tenancy or commencement of the relationship, (*e.g.*, since the date of marriage, birth, adoption, etc.). 1987 RSC § 2523.5(b)(1). If the tenant vacated due to death, a surviving family member could be entitled to a renewal lease if he/she had been residing with the tenant in the unit as a primary resident for a period of at least two years immediately prior to the death of the tenant (or one year if the family member was a senior citizen or disabled person). 1987 RSC § 2523.5(b)(2). Rent stabilization outside of New York City (*i.e.*, Nassau, Suffolk and Westchester Counties) did not have a succession provision -- only a "tenant" had the right to a renewal lease (ETPR § 2503.5), and the definition of "tenant" did *not* include family members [ETPR § 2500.2(h)]. Under New York City and New York State Rent Control, the regulatory provision limited succession to tenancy to family members in occupancy of the rent controlled housing accommodation with the tenant at the time of the tenant's death (Former 9 N.Y.C.R.R. §§ 2104.6(d), 2204.6(d)).

The four new regulatory provisions at issue (hereinafter the "New Regulations")[1] each establish two components

---

[1] These four regulatory provisions cover (a) rent control within New York City, (b) rent control outside New York City, (c) rent stabilization within New York City and (d) rent stabilization outside New York City.

for an occupant of a rent regulated apartment to be entitled to claim full rights of tenancy (although previously not occupying in a privity relationship with the landlord). First, the occupant must meet the definition of "family member." The new expanded definition of "family member" is defined as:

> (1) A husband, wife, son, daughter, stepson, stepdaughter, father, mother, step-father, step-mother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant;
>
> (3) Any other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove an emotional and financial commitment, an interdependence between such person and the tenant or permanent tenant. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed, may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such person be required or considered.
>
> (i) longevity of the relationship;
>
> (ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;
>
> (iii) intermingling of finances as evidenced by, among other things, joint ownership or bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government

benefits, etc.;

(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities; etc.;

(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills, naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

(vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

(vii) regularly preforming family functions, such as caring for each other or each other's extended family members and/or relying upon each other for daily family services;

(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long term, emotionally-committed relationship.

The provisions newly defining the term "family member" appear at 9 N.Y.C.R.R. § 2520.6(o) [New York City Rent Stabilization Code], 9 N.Y.C.R.R. § 2500.2(m) [New York State Rent Stabilization ETPR], 9 N.Y.C.R.R. § 2204.6(d)(3) [New York City Rent Control] and 9 N.Y.C.R.R. § 2104.6(d)(3) [New York State Rent Control].

A "family member," as newly defined above, is entitled, pursuant to the New Regulations, to claim full rights of tenancy upon the tenant having "permanently vacated the housing accommodation" if the "family member":

> [H]as resided with the tenant in the housing accommodation as a primary residence for a period of no less than two (2) years, or with such person as a "senior citizen," or a "disabled person" ... for a period of no less than one (1) year, immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods ....

The provisions newly defining succession to tenancy for family members appear at 9 N.Y.C.R.R. § 2523.5(b) and (e) [New York City Rent Stabilization], 9 N.Y.C.R.R. § 2503.5(d) [New York State Rent Stabilization], 9 N.Y.C.R.R. § 2204.6(d) [New York City Rent Control], 9 N.Y.C.R.R. § 2104.6(d) [New York State Rent Control].

REASONS FOR GRANTING THE WRIT

This case raises a significant constitutional takings issue arising under the 5th and 14th Amendments to the United States Constitution. New York's Court of Appeals recognized that the regulations must be examined under the heightened scrutiny standard enunciated by this Court in *Nollan v. California Coastal Comm'n.*, 493 U.S. 825 (1987). However, the Court below failed to draw a close nexus between the legitimate state interests proffered by the State of New York and the manner in which, if any, said interests were substantially advanced by the regulations at

issue. An innocent class of persons is forced to bear the brunt of the costs involved in providing housing for an indefinite period of time, for third parties selected by the New State Regulations. As a result, plaintiffs' Fifth and Fourteenth Amendment rights were violated.

In the instant case, the essential nexus was not supported by empirical or demonstrable evidence. The State asserted in its Regulatory Impact Statement (and the Court below seemingly accepted at face value) that the New Regulations would have "no significant adverse fiscal impact upon private regulated parties." Record on Appeal below Vol. II, p. 456. The Court of Appeals' approval of these regulations is contrary to the holdings and standards of this Court.

Other jurisdictions have similarly required that the heightened standard of scrutiny be substantiated by more than conclusory allegation. *See, Surfside Colony v. California Coastal Commission*, 226 Cal. App. 3rd 1260 (1991), *reh'g denied*, 1991 Cal. App. LEXIS 132 (Cal. App. 4th Dist. 1991); *Batch v. Town on Chapel Hill*, 376 S.E.2d 22 (N.C. App. 1989), *rev. on other grounds*, 387 S.E.2d 655 (N.C. 1990), *cert. denied*, 496 U.S. 391 (1990); *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 582 - 583 (9th Cir. 1991); *Leroy Land Dev. Corp. v. Tahoe Regional Planning Agency*, 733 F. Supp. 1399, 1401 (D. Nev. 1990), *rev'd*, 939 F.2d 696 (9th Cir. 1991); *Pengilly v. Multnomah County*, 810 F. Supp. 1111, 1113 (D. Or. 1992).

Under this Court's Rule 10.1(b) and (c) the writ should be granted. New York's Court of Appeals has determined the constitutional rights of a significant body of New York's private property owners in a manner that is contrary to the holdings of this Court as well as the standards and analysis utilized by both Federal and State appellate courts.

STATEMENT OF THE CASE

A. Procedural History

On November 9, 1989 DHCR promulgated "emergency" rules substantially changing the pre-existing definition of family and tenancy succession provisions pertaining to rent regulated apartments. The regulations amended were the New York City Rent Stabilization Code, 9 N.Y.C.R.R. §§ 2520.6 and 2523.5 (McKinneys Unconsol. Laws 1987, Supp. 1993); Emergency Tenant Protection Regulations ("ETPR"), 9 N.Y.C.R.R. §§ 2500.2 and 2503.5 (McKinneys Unconsol. Laws 1987, Supp. 1993 [applying to rent stabilized apartments outside the five boroughs of the City of New York]); the New York City Rent and Eviction Regulations ("rent control"), 9 N.Y.C.R.R. § 2204.6 (McKinneys Unconsol. Laws 1987, Supp. 1993); and the New York State Rent and Eviction Regulations, 9 N.Y.C.R.R. § 2104.6 (applying to rent controlled apartments inside the City of New York) (McKinneys Unconsol. Laws 1987, Supp. 1993).

The implementation of these rules was stayed on November 13, 1989 pursuant to an order to show cause commencing a declaratory judgment action seeking to declare the rules to be, *inter alia*, a violation of the Fifth and Fourteenth Amendments to the Constitution.

The declaratory judgment action was commenced by the Rent Stabilization Association (a voluntary association which represents over 25,000 members who own, manage and/or operate over 900,000 rent regulated apartments in various counties of the State of New York), the Delano Village Companies (an owner of private property consisting of 1800 rent regulated housing accommodations), Riverdale

Gardens (an owner of private property consisting of 440 rent regulated housing accommodations) and Coliseum Park Apartments Co. (an owner of private property consisting of 275 rent regulated apartments) (Record on Appeal below pp. 53 - 55). During the litigation, the Small Property Owners of New York ("SPONY") joined as a plaintiff-intervenor. SPONY consists of approximately 1000 owners of New York City residential buildings, most of which have less than ten units. Most SPONY members and their families live in the buildings that they own. (Record on Appeal below pp. 670 - 680).

The agency's explanatory documentation accompanying the emergency rules asserted that the emergency enactment "was necessary for the preservation of the general welfare" and was needed to deal with a low apartment vacancy rate.

With respect to New York City (but *not* other parts of New York State), DHCR stated that there was a "homelessness crisis" necessitating the enactment of emergency rules. No data was offered to link homelessness to restrictions on succession to tenancy of rent regulated apartments.

DHCR also stated that the emergency rules were necessitated because of the AIDS crisis facing New York State. However, the agency offered no data creating a nexus between the disease and occupancy of rent regulated apartments. Further, the agency did not explain how tenancy succession regulations would benefit such persons or why the specific disease identified should be a basis for extending special housing rights to persons, more so than any other disease suffered by tenants of rent regulated apartments.

Finally, the agency generically identified "poverty" as a

societal problem being addressed by these emergency regulations. However, no nexus was drawn between the problem of poverty and the actual impact of the regulations. Notably, no income test was established by the regulations; thus, enabling the rich to benefit as readily as the poor.

On March 20, 1990, the "emergency" rules were adopted by DHCR as "permanent" amendments, despite the existence of a temporary restraining order which explicitly barred the effectuation and/or implementation of the rules from their inception.[2]

On December 4, 1990, on appeal by respondents, the Appellate Division, First Department, vacated the TRO (which it had *sua sponte* deemed to be a preliminary injunction) and allowed the new regulations to go in effect. The Appellate Division, First Department, held that the challenged regulations did not authorize " 'the permanent occupation of the landlord's property by a third party' of the sort, which traditionally, has been held to be a 'taking' (*see, Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 441)." *Rent Stabilization Association v. Higgins*, 164 A.D.2d at 297, 562 N.Y.S.2d 962 (App. Div. 1st Dep't 1990). App. C, 34a. The Appellate Division further opined that "the plaintiffs will not be able to demonstrate that the regulations do no substantially advance a legitimate state interest or that they deny landlord's economically viable use of their property" *Rent Stabilization Association v. Higgins*, 164 A.D.2d at 299. App. C, 36a.

On November 27, 1991, relying upon the Appellate

---

[2] Pursuant to plaintiffs' amended complaint, the permanent amendments were challenged as, *inter alia*, a violation of the Fifth and Fourteenth Amendments.

Division's prior December 4, 1990 opinion, the Supreme Court summarily issued a final declaratory judgment upholding the validity of the new regulations. App. D, 38a - 46a. On January 12, 1993 the Appellate Division affirmed the Supreme Court's declaratory judgment. In so holding, the Appellate Division stated that:

> Even under the heightened scrutiny applicable to regulatory takings, the regulations substantially advance a legitimate governmental interest (see, *Nollan v. California Coastal Commission*, 493 U.S. 825, 834). (App. B, 19a).

On December 21, 1993, the Court of Appeals affirmed, holding that the regulations constituted neither a physical nor a regulatory taking (App. A, 1a - 16a).

In a separate concurrence Justice Joseph Bellacosa "perceive[d] significant practical and governance concerns that merit close attention as an outgrowth of this decision" (App. A, 17a). Justice Bellacosa further stated that New York State's Legislature should "carefully assess the sweeping power it impliedly invested in this administrative agency in the execution of a unique human sheltering mission." Justice Bellacosa noted the likelihood of numerous "as applied" challenges to the regulations because New York's rent regulated tenancies:

> [A]re likely to bloom as perennials becoming functionally transformed into perpetual stakeholds [potentially resulting in] the functional equivalent of divesture from land owners of reversionary rights to their properties without just compensation and due process. (App. A, 17a.)

ARGUMENT

I. In Light Of The Restriction Of Property Rights Imposed By The New Regulations, There Is No Basis For The Lenient Standard Used By The Court Of Appeals To Review The Relation Between Those Regulations And Their Alleged Objectives.

The Federal Constitution prohibits the government's taking of private property without payment of just compensation and bars the deprivation of property absent due process of law. U.S. Const. Amend. V. and Amend. XIV § 1. The new regulations raise serious issues under the Takings and Due Process Clauses because they (1) compel owners to enter into privity relationships with unknown persons; (2) force owners to rent their property for indefinite and potentially perpetual successive terms to persons with whom the owners never previously had any contractual or statutory privity, nor could reasonably have expected to have such a permanent relationship; (3) authorize physical occupation by such persons upon the owner's property; and (4) deprive owners of reasonable, investment backed expectations, and, in some cases, deprive owners of all economically beneficial use of their property. These constitutionally protected rights were invaded absent any evidence that the regulations substantially advance legitimate state interests.

This Court has classified takings claims in two categories. The first encompasses government action that compels an owner to suffer a physical invasion of its property [*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *United States v. Causby*, 328 U.S. 256 (1946)], or deprives an owner of all economically viable or productive use of its property. *Lucas v. South Carolina*

Coastal Council, ___ U.S. ___, 112 S. Ct. 2886, 2893 (1992); *c.f. Agins v. City of Tiburon*, 447 U.S. 255 (1980). These government actions constitute a *per se* taking which requires just compensation, regardless of the public interest in support of their regulation.

The second type of taking claim entails a more complex assessment of the purposes and effects of the government action. The challenged government action generally only regulates the *use* of property. However, even regulation of the use of property must be compensated if the purpose of the regulation does not *substantially* advance legitimate state interests or if it has unfairly singled out the private property owner to bear a burden that should be borne by the public as a whole. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992); *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-125 (1978), *reh'g denied*, 439 U.S. 883 (1978); *Seawall Assoc. v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989), *cert. denied*, 493 U.S. 976 (1989).

Significantly, all types of takings claims are subject to a heightened scrutiny standard of review by the courts. *Nollan*, 483 U.S. at 834 - 837, 841. In the context of a regulatory taking claim, heightened scrutiny review means that the court must closely examine whether a regulation that infringes upon a protected property interest *substantially* advances a legitimate state interest.[3] The *Nollan* Court

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[3] While the government's burden in defending a land use regulation against a regulatory taking claim is less than that in a *per se* taking case, under the required heightened scrutiny standard, the government must still do more than what DHCR has done here, *i.e.*, simply pronounce public interests it wishes to

stressed that:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination . . . . [O]ur cases describe the condition for abridgement of property rights through the police power as a **"substantial advanc[ing]"** of a legitimate state interest.

483 U.S. at 841 (emphasis in the original).

The new regulations radically expanded the term "family member of the tenant" beyond the discrete set of blood and spousal relatives,[4] and (b) significantly changed the manner in which formerly and newly defined "family members" could obtain potentially perpetual rights of tenancy and rent regulated apartments without the owner's consent.

Under the new regulations, occupants (of both rent controlled and rent stabilized apartments) with distant or no blood or spousal relationship to the tenant, could succeed, in potential perpetuity, to valuable and scarce rent regulated apartments whenever the tenant of record "permanently vacates." DHCR drastically reduced the occupancy threshold for succession by traditional family members, as well as by unrelated occupants, roommates and distant relatives, and eliminated all of the differences between the rent stabilization and rent control systems in this area.

Under the New Regulations, any person who has co-occupied either a rent controlled or rent stabilized apartment with the tenant of record for two years or less,

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advance. *Lucas*, *supra*, at 2901 - 2902.

[4] 1987 RSC § 2520.6(o); ETPR § 2500.2(m) had a similar definition for "immediate family." There was no definition for "family member of a tenant" in the rent control regulations.

can qualify for potentially perpetual rent regulated tenancy rights if he/she proves "emotional and financial commitment and interdependence" with the tenant. Numerous details of the relationship between the occupant and the tenant may be examined; however, *none is dispositive.*

Completely separate and apart from creating a new definition of "family member," DHCR also radically diminished the co-occupancy criteria that previously applied to traditional family members before they could acquire tenancy succession rights.[5]

In *Yee v. City of Escondido*, 112 S.Ct. 1522, this Court enumerated regulatory infringements on property that may be considered unconstitutional takings without just compensation. Among the proscribed hardships articulated in *Yee* are:

> • Owners not being able to decide who their tenants will be ("inability to select their incoming tenants") 112 S.Ct. at 1528, 1530.
>
> • Owners not being able to exclude strangers, absent extraordinary and costly measures. 112 S.Ct. at 1528.
>
> • Owners not being able to easily convert their property to other uses. 112 S.Ct. at 1528.
>
> • Regulations, in effect, transferring a right to occupy a land indefinitely at a submarket rent from the owner to the tenant. 112 S.Ct. at 1528.
>
> • Regulations not benefiting the intended beneficiaries. 112 S.Ct. at 1530.

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[5] Under the New Regulations, the distinction between a tenant's voluntary vacatur from an apartment and a tenant's involuntary vacatur due to death is completely eliminated without any explanation from DHCR. *Any occupant* could succeed to the tenant's rent regulated tenancy -- *regardless of the reasons why the tenant vacated* -- if that occupant has resided in the apartment for two years or less.

While these types of government infringements in private rental property were not considered *per se* physical takings in *Yee*, *Yee* makes clear that certain types of rent regulation could, under appropriate circumstances, rise to the level of a regulatory taking if the government does not provide just compensation.

Whether a rent regulation amounts to a regulatory taking involves a balancing between the adjustment of rights and the public good. Where the adjustment for the public good becomes so disproportionate that the governmental action is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," a regulatory taking will have occurred. *Armstrong v. United States*, 364 U.S. 40 (1960); *Seawall Assoc. v. City of New York*, 74 N.Y.2d 92 at 107.

In the instant case, DHCR premises its New Regulations upon the purported state interest in resolving four difficult societal problems: an alleged low vacancy rate in housing; homelessness; poverty; and the AIDS crisis. Notably, although these economic, social and medical problems receive repeated reference in DHCR's Regulatory Impact Statements, Certifications and Statements of Emergency, the actual text of the New Regulations themselves are **totally silent** regarding the alleviation of these problems via the regulatory scheme. There is no income test, no means test, no age test, no disability test, no illness test, no lack-of-alternative-housing test, or any other standard, threshold or requisite element which would somehow ensure that these rules would actually, let alone substantially, advance the state interests alleged by DHCR and cited by the Court of Appeals.

In the face of this, the Court of Appeals did nothing more than pay lip service to *Nollan's* requirement of a "close causal nexus between the challenged regulations and the stated purpose." App. A, 13a - 15a. It devoted all of one sentence to actually examining this nexus: "People who would, absent the regulations, be threatened with eviction from their homes may now have the right to remain." App. A, 14a.

This cursory analysis utterly fails to address the question of whether the new rules substantially alleviate the problems identified by the Court -- the low vacancy rate, increasing homelessness and poverty, and the AIDS epidemic. App. A, 5a. Because the new rules are totally lacking in any qualifying criteria related to these problems, it is only by random chance that those who actually benefit from the rules will be the one suffering from these problems.[6]

Strangely enough, the Court of Appeals identifies this very factor -- whether the persons who benefit are the ones in need of benefit -- to distinguish the new succession rules from the single room occupancy law that it struck down in its previous major takings case, *Seawall Assoc. v. City of New York*:

> In *Seawall*, on the other hand, forcing owners to let single room occupancy accommodations did not substantially advance the City's interest in alleviating homelessness because those units would

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[6] The Court identified a fifth factor as well -- "the rise in non-traditional families." App. A, 5a. The new rules, however, go far beyond addressing non-traditional families, since they effectively include practically *any* financially interdependent group of friends who live together for a sufficient amount of time.

> not necessarily have been rented to homeless or potentially homeless persons." App. A, 14a, citing *Seawall*, 74 N.Y.2d at 111, 112 n.11.

But the new succession rules obviously fare no better in this regard. DHCR did not so much as feign an attempt below at tying the New Regulations to the state interests that are alleged to be the reason and rationale for their enactment. Moreover, the persons whom they benefit may be rich as well as poor and healthy as well as ill. They may as likely have access to alternative housing as not. As for alleviating the low vacancy rate, the rules can only worsen the situation, not better it. Every unit occupied by a beneficiary of the new rules is a unit not available to someone else, and the tightened regulatory rigidity can only discourage further investment in housing.[7]

Unfortunately, the requisite high standard of review has *never* been actually applied to the new regulations. Although both the Appellate Division, First Judicial Department and New York Court of Appeals affirmatively confirmed the requirement that the regulations pass constitutional muster via compliance with the *Nollan* heightened scrutiny/sub-stantial advancement test, neither court engaged in an actual analysis which draws a nexus from a legitimate state interest to the substantial advancement thereof. As is described above, following the Appellate Division's

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[7] "There is a growing consensus that 'rent control causes a reduction in the quality of the existing housing stock and discourages investment in new rental property,' actually exacerbating the problems it is intended to ameliorate." *Hall v. City of Santa Barbara*, 797 F.2d 1493, 1503 n.26 (9th Cir. 1986), quoting The Report of the President's Commission on Housing 91 (1982).

confirming the applicability of the *Nollan* standard, the Appellate Division then refrained in engaging in any actual *Nollan*-type analysis. Similarly, following the Court of Appeals' agreement as to the applicability of the *Nollan* standard, no *Nollan*-type analysis was engaged in; to the contrary, the court of Appeals engaged in an irrelevant deference to the administrative agency's expertise in the field of housing -- an overt avoidance of the requisite means/ends analysis mandated by *Nollan*.

Again, although much appellate "lip service" has been given to the necessity of adhering to the heightened scrutiny mandated by this Court in *Nollan*, a true *Nollan*-type analysis has *never* been applied to the regulations at issue.

II. The Court Of Appeals Decision Totally Ignores The Issue Of Whether Landlords Are Responsible For The Social Problems Targeted By The New Succession Rules; It Thus Omits A Fundamental Element Of Takings Jurisprudence -- That Public Burdens, Such As Homelessness And Poverty, Should Be Borne By The Public At Large, Rather Than By Landlords.

In its decision the Court of Appeals described the following grounds for DHCR's new rules: "New York's chronic low rental vacancy rate for affordable units, increasing homelessness and poverty, the AIDS epidemic and the rise in non-traditional families. . . ." App. A, 5a. These social problems have one key feature in common -- they are, in no sense, the fault of landlords who bear the full regulatory costs of the new rules. As is shown below, the connection between a social problem and the individuals forced to bear the costs of its alleviation is key criterion in determining whether a regulation of property constitutes a

taking. It is also a criterion that the Court of Appeals failed to address, and that the new rules themselves utterly failed to meet.

A. The Supreme Court Has Established That Under The Takings Clause, Property Owners Cannot Be Singled Out To Bear The Cost Of Curing Social Problems Which They Had No Hand In Creating.

For more than a century, Supreme Court decisions have made it clear that the takings clause embodies a fundamental notion of fairness in the allocation of social burdens. The constitutional guarantee of just compensation is intended to prevent individuals from being forced to "surrender to the public something more and different from that which is exacted from other members of the public." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). It is aimed at preventing the state from "loading upon the individual more than his just share of the burdens of government." *Id.* The ban on uncompensated takings "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

As this court noted only two years ago, a regulatory taking can occur when a "regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido*, 112 Sup. Ct. 1522, 1526 (1992).

Fairness is not the only purpose of the Takings Clause in this context. As the New York Court of Appeals itself recognized in the past, the requirement of

compensation also acts as a major brake on the political incentive to conceal the costs of government programs by loading them onto unlucky individuals. It thus reduces the natural public demand for even more seemingly free benefits:

> The ultimate evil of a deprivation of property . . . under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who shall bear the cost initially. Of course, as further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding . . . When [the social cost is] successfully concealed, the public is not likely to have any objection to the "cost free" benefit.

Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 596 - 97, 385 N.Y.S.2d 5, 11 (1976).[8]

The new succession rules operate in precisely this manner. Their cost, in the form of reduced rent rolls,

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[8] *See, also, Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., joined by O'Connor, J., concurring in part and dissenting in part): "The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget', with relative invisibility and thus relative immunity from normal democratic processes." In contrast, consider the politically *unattractive* feature of "on budget" steps: "Guiliani Cuts Cash Incentives to Landlords to House Homeless", New York Times, March 16, 1994, p. B1.

reduced control over tenant selection and diminished ability to recover vacant apartments is borne solely by landlords. For this reason alone, the new rules, "even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause." *Nollan*, 107 Sup. Ct. at 3147 n.4.

B. The Important Issues Of Tenant Hardship Which This Court Found Premature In Pennell v. City Of San Jose Are Ripe For Consideration In This Case.

In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), this Court reviewed, at considerable length, a San Jose rent control ordinance that allowed otherwise reasonable rent increases to be reduced upon a tenant's showing of hardship. The Court ultimately ruled the landlords' facial challenge to be premature, because there was no showing that the hardship factor had in fact ever been used; that is, that it " has in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at . . ." *Id.* at 9 - 10.

Like *Pennell*, the instant case also involves tenant hardship as a basis for restricting landlord rights. Like *Pennell*, it too is facial challenge. But unlike *Pennell*, in the instant case there is no question that the new rules are preventing evictions and vacancies that would otherwise have occurred. In the Court of Appeals' words, tenants "who would, absent the regulations, be threatened with eviction from their homes may now have the right to remain." App. A, 15a.

Not surprisingly, there have been numerous cases involving the application of the new rules. Family members, as defined by the new regulations, have been awarded full

rights of rent regulated tenancy via the implementation of the new regulations in *RSP Realty Assoc. v. Paege*, N.Y.L.J. Aug. 14, 1992, p. 21, col. 4 (App. T. 1st Dep't); *43-45 West 129th Street HDFC v. Doe*, N.Y.L.J. March 22, 1992, p. 31, col. 2 (Civ. Ct. N.Y. Co.); *Weehawken St. Assoc. v. Nudorg*, N.Y.L.J. March 26, 1991, p. 21, col. 3 (App. T. 1st Dep't); *King v. Hart*, N.Y.L.J. June 15, 1990, p. 21, col. 1 (App. T. 1st Dep't); *Yoba v. Young*, N.Y.L.J. Sept. 25, 1991, p. 27, col. 2 (Civ. Ct. N.Y. Co.); *Estate of James Smith v. Attwood*, N.Y.L.J. May 18, 1990, p. 21, col. 6 (App. T. 1st Dep't); *Seminole Housing Corp. v. Leone*, N.Y.L.J. May 24, 1990, p. 27, col. 4 (App. T. 2nd & 11th Jud. Dep'ts); *Park Holding Co. v. Anderson*, N.Y.L.J. Apr. 12, 1990, p. 27, col. 3 (App. T. 1st Dep't); *Estate of Causse*, N.Y.L.J. Nov. 28, 1990, p. 23, col. 2 (Sur. Ct. N.Y. Co.); *Lerad Realty Co. v. Reynolds*, N.Y.L.J. Aug. 29, 1990, p. 22, col. 5 (Civ. Ct. N.Y. Co.); *Lepar Realty Co. v. Griffin*, 151 Misc. 2d 579, 581 N.Y.S.2d 521 (App. T. 1st Dep't 1991).

In short, this case presents an opportunity for this Court to resolve issues of tenant hardship and landlord property rights which were left unresolved in *Pennell* and whose seriousness is indicated by the lengthy separate opinion in that case. 485 U.S. at 15 - 24 (Justices Scalia and O'Connor concurring in part and dissenting in part.) The considerations which warranted review in that case are fully operative here.

III. New York's Vast Expansion Of The Term "Family Member" For Succession Purposes Is An Unconstitutional Attempt To Alter Property Rights By Means Of Ipse Dixit Redefinitions.

Prior to the new rules, owners of rent-controlled and

rent stabilized apartments were subject to numerous restrictions on their property -- restrictions whose validity is neither challenged nor conceded in this case. These owners did, nonetheless, retain a reversionary interest in rental units that became vacant when they were not occupied by qualified family members under the old succession rules.

With DHCR's vast enlargement by redefinition of "family," that reversionary interest has consequently been significantly reduced. In the context of property rights, however, "family" is a major concept that cannot be administratively altered at will. As this Court's decisions in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), demonstrate, there is a significant difference between the state's power to regulate living arrangements between unrelated individuals as compared to those involving people related by "blood, adoption, or marriage." *Moore*, 431 U.S. at 498. Regulations involving the former are subject to typical judicial deference, while regulations concerning the latter demand heightened scrutiny. *Id.* at 498 - 99. Thus in *Belle Terre* this Court upheld a zoning restriction on the number of unrelated individuals who could occupy a single unit, while in *Moore* it struck down an ordinance which prevented a grandmother from living with her grandson.

More importantly, when property rights depend directly on the definition of "family," as in the case of the landlords' reversionary interests, any redefinition of that term by the state results in a redefinition of the property right itself. It is clear, however, that "government does not have unlimited power to redefine property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982). When the state does engage in redefinition of a

scope comparable to that involved here, it engages in a taking. A "State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). In redefining the term "family" through its new succession rules, New York has engaged in precisely such an *ipse dixit* transformation.

IV. The Court of Appeals' Dismissal Of The Taking By Physical Occupation Issue Flies in The Face of This Court's Decision in Yee v. City of Escondido.

The landlords raised the claim that the new rules would create perpetual tenancies to a far greater degree than had existed under the prior rules. This was due both to the greatly expanded definition of family member, and to the reduced co-residency requirement which would make it easier to qualify for protection. Decision below, App. A, 4a - 5a.

The Court of Appeals rejected this claim, ruling that tenancies of indefinite duration did not "without more [constitute] a permanent physical occupation of property." App. A, 11a. In the Court's view, the distinguishing feature here was that there had been a "voluntary acquiescence" by the landlords "in the use of [their] property for rental housing . . ." App. A, 12a, citing *Yee v. City of Escondido*, 112 Sup. Ct. 1522 (1992).

This analysis is fundamentally flawed, because it ignores the fact that, under New York State Law, these landlords are barred from withdrawing their acquiescence; that is, they cannot unilaterally decide to go out of the rental business, but instead must meet specified statutory criteria before they can evict their tenants and withdraw

their properties from the rental market. Under rent control, for example, eviction certificates can only be issued on the basis of the criteria set out in N.Y.C.R.R. § 26-408b. This statute allows eviction only under strictly limited circumstances -- for example, a landlord wishing to personally occupy his premises must show an "immediate and compelling necessity;" the tenants he seeks to remove must be under the age of sixty two, they must have resided in the house for less than twenty years and they must not be medically impaired. § 26-408b(1).

As a result of this and related statutes, there is "a total absence of any remedy to a landlord who does not qualify but just wants to cease being a landlord altogether" -- an outcome that the New York courts upheld against constitutional challenge in *Sobel v. Higgins*, 151 Misc. 2d 876, 573 N.Y.S.2d 1000, 1003 (Sup. Ct. 1991), *aff'd*, 590 N.Y.S.2d 883 (App. Div. 1992), *leave to appeal denied*, ___ N.Y.2d ___ (1993). In the words of the New York Appellate Division, the tenant (in that case) had "a perpetual right to remain in possession." 590 N.Y.S.2d at 884.

The situation for rent-stabilized apartments is essentially the same. The "rent stabilized tenant, like his rent controlled neighbor, enjoys occupancy for so long as he wishes." *Resolution Trust Corp. v. Diamond*, ___ F.3d ___, No. 92-6244 (2d Cir., Mar. 2, 1994), sl. op. at 6.

It is clear from *Yee*, however, that such perpetual tenancies may well constitute takings by physical occupation. While *Yee* upheld a California municipal rent control statute, it did so in a statutory context that *recognized* a landlord's right to cease renting at will, and thus was exactly the opposite of New York's:

> At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants . . . Put bluntly, no government has required any physical invasion of petitioners property . . . While the 'right to exclude' is doubtless . . . 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,' *Kaiser Aetna v. United States*, 444 U.S. 164, 176 . . . (1979), we do not find that right to have been taken from petitioners on the mere face of the Escondido ordinance.

112 Sup. Ct. at 1528.

Most importantly, in *Yee* the Supreme Court made it clear that, if the law *had* compelled the landowners to rent, then it would have been unconstitutional:

> A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent or to refrain in perpetuity from terminating a tenancy.

112 Sup. Ct. at 1529; *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987); *Fresh Pond Shopping Center, Inc., v. Callahan*, 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting).

While perpetual tenancies in New York did not originate with the new succession rules, under these rules they clearly will become more common. The Court of Appeals brushed aside the physical takings question with its reference to the landlords' "voluntary acquiescence" to

renting their property. App. A, 12a. But as the above quote from *Yee* indicates, physical takings can result not only from forcing a landlord to begin renting, but also from mandating that he continue to rent. The Court of Appeals may have cited *Yee* in disposing of this issue, but its treatment of the question was in fact directly contrary to *Yee*.

CONCLUSION

This case represents a dramatic and frightening example of an administrative agency imposing the costs of its view of societal problems, social mores, inheritance and sanctity of contract upon a group of innocent property owners in violation of constitutional provisions, principles and precedent. More than one million apartments and more than 25,000 owners of property throughout the State of New York are affected by these Regulations. An unelected and, ultimately, non-accountable bureaucratic agency has taken it upon itself to redefine the notions of family, tenancy, contract and inheritance predicated solely upon a bald articulation of its avowed purposes, absent any close and substantial nexus between the alleged state purposes and the actual effect of the Regulations at issue.

Although the appellate courts below consistently recognized the requirements of carefully finding a close nexus between regulatory purpose and effect and examining such nexus under a heightened scrutiny standard, that analysis, as mandated by this Court, was *never* undertaken.

Plaintiffs do not contend that all forms of rent regulation are unconstitutional. Nor do plaintiffs deny that the State may regulate rental housing pursuant to its police powers. However, the voluntary placement of property into

the rental housing market does not mean that the government has the right to take away all control over the property from its owner, place it into the hands of unknown third parties, and provide the owner with no compensation for these lost rights. A governmental agency does not have the right to unilaterally destroy the value of private property by eliminating its reversionary and exclusionary qualities without paying just compensation to the aggrieved property owners. Petitioners submit that the challenged Regulations are an overt usurpation of valuable and intrinsic property rights.

The New York State Division of Housing and Community Renewal crossed the constitutional bright line standard. By failing to properly analyze the regulations at issue, New York's Court of Appeals ruled in a manner that conflicts with this Court's decisions and that raises serious issues regarding the property rights of a vast number of innocent landlords.

For these reasons, petitioners respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Dated: *New York, New York*
March 21, 1994

Respectfully submitted,

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No. 93 - _____

In The

Supreme Court of the United States

October Term, 1993

THE RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., THE DELANO VILLAGE COMPANIES, RIVERDALE GARDENS, COLISEUM PARK APARTMENTS CO., and SMALL PROPERTY OWNERS OF NEW YORK,

Petitioners,

-against-

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, ROBERT WELLS, EVERETT QUINTON, GAY MEN'S HEALTH CRISIS, INC., JANET GOODMAN, KAIROS RENCHER, and DISABLED IN ACTION,

Respondents.

APPENDIX

St. Louis & Westervelt, Inc.

Appendix A - Opinion And Order of The New York State Court of Appeals, Decided December 21, 1993 [Pages 1a - 17a]

State of New York Court of Appeals

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1 No. 259
Rent Stabilization Association of New York City, Inc., et al.,
Appellants,
and Small Property Owners of New York,
Intervenor-Appellant, **OPINION**
v.
Richard L. Higgins, & c.
Respondent,
and Robert Wells, et al.,
Intervenors-Respondents.

Sherwin Belkin, for appellants.
Ronald D. Hariri, for intervenor-appellant.
Cullen S. McVoy, for respondent.
Paris R. Baldacci, for intervenors-respondents.
Community Housing Improvement Program, Inc.; Pacific Legal Foundation; New York State Tenant and Neighborhood Coalition, Inc., et al.; Eastern Paralyzed Veterans Association, et al.; City of New York; and The Real Estate Board of New York, Inc., amici curiae.

KAYE, CHIEF JUDGE:

Essentially two challenges are mounted by appellant-property owners to regulations promulgated by respondent Division of Housing and Community Renewal (DHCR)

enlarging the class of "family members" entitled to succeed to a rent-regulated apartment on the death or departure of the tenant of record. As did the Appellate Division, we conclude first that the regulations are within the agency's rulemaking authority, and second that no unconstitutional "taking" was effected.

I.

We begin with the background of the challenged regulations. In response to what it found to be a severe housing shortage following World War II, the legislature enacted laws providing for rent control and, later, rent stabilization.[1] Perceiving that continuing need throughout the ensuing decades, the legislature has periodically extended rent regulation to the present day, most recently providing for decontrol only of apartments with monthly rents in excess of two thousand dollars (see, Rent Regulation Reform Act of 1993, L 1993, ch 253 [extending rent control and rent stabilization until June 15, 1997]).

The legislature in 1983 designated DHCR "the sole administrative agency to administer the regulation of residential rents" under the rent control and rent stabilization statutes (Omnibus Housing Act, L 1983, ch 403, § 3), and in 1985 additionally granted DHCR authority to amend the Rent Stabilization Code (a body of regulations previously administered by a private association of property owners) (see, L 1985, ch 888, § 2).

The rent control statute accorded noneviction

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[1] See, Emergency Housing Rent Control Law (L 1946, ch 274, as amended [rent control outside New York City]); Local Emergency Housing Rent Control Act (L 1962, ch 21, as amended [rent control within New York City]); Rent Stabilization Law (Administrative Code of the City of New York §§ 26-501 to 26-520, as amended [1962] [rent stabilization within New York City]); and Emergency Tenant Protection Act [L 1974, ch 576, as amended [rent stabilization outside New York City]).

protection to a "tenant," meaning that the tenant had the right to remain after expiration of the original tenancy (see, McKinney's Uncons Laws of NY § 8585 [1] [1984]; Administrative Code § 26-408 [a] [1985]). In the event of the tenant's death, the rent control regulations promulgated under the statute additionally prohibited eviction of the surviving spouse or a family member who had been living with the tenant (see, 9 NYCRR 2104.6 [d] [1987]; 2204.6 [d] [1987]). That protection was later extended to family members living with a tenant who voluntarily vacated the apartment (see, Matter of Herzog v Joy, 74 AD2d 372, 376, affd 53 NY2d 821).

The rent stabilization statute required that a renewal lease be offered to a "tenant" (see, Administrative Code § YY51-6.0 [c] [4] [1969]), but nothing in the regulations elaborated upon the statutory language. Thus, unlike rent Control, under rent stabilization only the tenant of record was entitled to a renewal lease (see, Sullivan v Brevard, 66 NY2d 489, 493). In 1987, however, DHCR amended the rent stabilization regulations to provide noneviction protection to "family members," a term defined in the Code to include 24 specified blood-or-marriage relationships (see, 9 NYCRR 2520.6 [0] [1987]). Where the tenant of record died, family members who had resided in the unit for at least two years (one year if the tenant was elderly or disabled) were entitled to succeed to the tenancy; where the tenant of record voluntarily vacated the apartment, family members who had resided in the unit from the inception of the tenancy or commencement of the relationship were entitled to succeed to the tenancy (see, 9 NYCRR 2523.5 [b] [1987]).

DHCR's amendments to the Rent Stabilization Code were sustained by the Appellate Division as an appropriate exercise of the agency's authority (see, Festa v Leshen, 145 AD2d 49) and are not challenged on the present appeal.

APPENDIX A

[Opinion And Order of New York Court of Appeals 1993]

This Court in 1989 determined that "family member" as used in the rent control regulations included the life partner of a deceased tenant who had resided with the tenant for many years in a familial-type relationship (see, Braschi v Stahl Assocs. Co., 74 NY2d 201, 211; see also, E. 10th St. Assocs. v Estate of Goldstein, 154 AD2d 142 [extending holding in Braschi to rent stabilization regulations]). Months later, DHCR promulgated the regulations at issue on this appeal.

II.

The regulations were first issued by DHCR on November 8, 1989 as emergency regulations extending noneviction protection to qualified family members of a tenant of record in all rent-regulated housing where the tenant vacated the unit. The regulations were made permanent on March 20, 1990 after public hearings and became effective April 4, 1990.[2]

The regulations enlarged the definition of "family member," beyond blood or marriage, to include:

> Any other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment and interdependence between such person and the tenant or permanent tenant. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence

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[2] See, Rent and Eviction Regulations (9 NYCRR 2104.6 [d] [rent control outside New York City]; 2204.6 [d] [rent control within New York City]); Emergency Tenant Protection Regulations (9 NYCRR 2500.2 [n], 2503.5 [d] [rent stabilization outside New York City]); Rent Stabilization Code (9 NYCRR 2520.6 [o], 2523.5 [b] [rent stabilization within New York City]).

> existed may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such persons be required or considered.

The specified relevant factors are i) longevity of the relationship; ii) whether the parties share household expenses; iii) intermingling of finances; iv) whether they engage in family-type activities; v) whether they have formalized legal obligations toward each other; vi) whether they hold themselves out as family members; vii) whether they regularly perform family functions; and viii) any other pattern of behavior that evidences an intention to create a long term, emotionally committed relationship. The amendments extend noneviction protection uniformly to family members whether the tenant dies or vacates voluntarily, so long as the family member has resided in the apartment for two years (one year where the tenant is elderly or disabled), or has resided with the tenant from the inception of the tenancy or the commencement of the relationship.

As the grounds for its action, DHCR specified New York's chronic low rental vacancy rate for affordable units, increasing homelessness and poverty, the AIDS epidemic and the rise in non-traditional families (including same-sex couples, de facto marriages, single parent households and other living arrangements no longer exceptional). The regulations, according to DHCR, were "intended to clarify a non-traditional family member's right to remain in his or her home, particularly at a time when a significant percentage of these households may be vulnerable to the AIDS epidemic." In extending the protection to all qualified family members regardless of the reason for the tenant's permanent departure, DHCR claimed that it redressed a situation that in its experience had led to illogical and unjust results.

APPENDIX A
[Opinion And Order of New York Court of Appeals 1993]

In releasing the regulations, DHCR stated that New York's crisis in affordable housing posed an immediate threat requiring emergency regulations because, with tenants dying or vacating apartments daily, landlords and remaining occupants needed guidance and some measure of consistency in determining who would be permitted to remain in rent-regulated housing and who could be evicted. In assessing the added burden on property owners, DHCR concluded that the average building's rent rolls would be reduced by .045% due to fewer regulated apartments subject to a vacancy increase in any given year. DHCR further found the effect of the regulations directly proportional to the number of units owned, thus concluding that small property owners would not be disproportionately affected. Finally, DHCR noted that an owner's right to collect the regulated rent and evict undesirable tenants would be unaffected by the new regulations.

Appellants sought a preliminary injunction and a declaration that the new regulations were unconstitutional and invalid, and Supreme Court temporarily restrained their implementation; the Appellate Division, however, deeming the TRO a preliminary injunction, reversed and vacated the restraint (164 AD2d 283). After Supreme Court granted respondents' cross-motion for a declaration that the regulations were within the proper exercise of DHCR's authority, appellants sought a direct appeal to this Court, which we transferred to the Appellate Division on the ground that questions other than the constitutional validity of a statute were involved (see, CPLR 5601 [b] [2]). The Appellate Division upheld the regulations as a valid exercise of DHCR's authority for the reasons set forth in its opinion vacating the preliminary injunction, adding that the regulations substantially advance a legitimate governmental interest under the most recent United States Supreme Court opinions addressing regulatory takings (see, Lucas v

South Carolina Coastal Council, 505 US ___; Yee v City of Escondido, 503 US ___). Because a substantial constitutional question is directly presented, appeal to this Court lies as of right (see, CPLR 5601 [b] [1]).

III.

We first address appellants' assertion that DHCR was without authority to adopt the challenged regulations.

Appellants recognize that the legislature has provided DHCR a broad mandate to promulgate regulations in furtherance of the rent control and rent stabilization laws that will "inevitably require some changes in the legal relationship between landlords and tenants" (see, Matter of Versailles Realty Co. v New York State Div. of Hous. and Community Renewal, 76 NY2d 325, 328 - 329, rearg. denied 76 NY2d 890),[3] and indeed do not challenge earlier regulations providing for family succession to rent-regulated housing. They urge, however, that with the most recent regulations, DHCR has overstepped its mandate and invaded the province of the legislature, in violation of the constitutional separation of powers.

As an arm of the executive branch of government, an administrative agency may not, in the exercise of rulemaking authority, engage in broad-based public policy determinations (see, Boreali v Axelrod, 71 NY2d 1, 9). In Boreali, we concluded that the difficult-to-demarcate line between administrative rulemaking and legislative policymaking had

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[3] See, McKinney's Uncons Laws of NY § 8584 (4) (DHCR empowered to "adopt, promulgate, amend or rescind such rules, regulations and orders as it may deem necessary or proper to effectuate the purposes of" rent control); Administrative Code § 26-405 (g) (1) (same); McKinney's Uncons Laws of NY § 8630 (DHCR authorized to implement "appropriate" rent stabilization regulations); Administrative Code § 26-511 (DHCR authorized to amend Rent Stabilization Code to "protect [] tenants and the public interest").

been transgressed, and invalidated regulations promulgated by the Public Health Council prohibiting indoor smoking in specified public areas on the ground that the regulatory scheme was improperly based upon policy considerations originating with the agency and not the legislature. We identified four "coalescing circumstances" indicating that the agency, in enacting the regulation, had usurped the role of the legislature in making public policy assessments.

First, the agency created exemptions from the smoking ban for particular indoor areas, such as trade shows, conventions and bars, or upon a showing of financial hardship, from which we concluded that the agency had improperly weighed competing health and public policy concerns. Exempting certain indoor areas from these regulations required consideration not of health concerns--the agency's proper focus--but of competing social and political issues. Second, the agency enacted the smoking ban on a clean slate, exceeding its proper role of merely filling the interstices of a legislative mandate. Third, the legislature itself had repeatedly failed to reach agreement on indoor smoking, suggesting that the subject was one that required resolution of competing policy interests. Finally, the regulatory scheme--"a simple code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups"--did not require the agency's particular competence in the field of public health.

Such circumstances are not present in this case. Rather, in defining the persons to be afforded noneviction protection in an ongoing housing crisis, DHCR has acted within its competence and authority (see, Matter of Consolidated Edison Co. v Department of Environmental Protection, 71 NY2d 186, 191-192; Matter of Nicholas v Kahn, 47 NY2d 24, 31).

Most significantly, DHCR has not acted on a clean

slate--noneviction protection in rent-regulated housing was first created by the legislature in the rent control and rent stabilization laws (see, McKinney's Uncons Laws of NY § 8585 [1]; Administrative Code §§ 26-408 [a], 26-511 [c] [4]). This protection has in the past been enlarged by the agency, after which the legislature has voted to extend rent regulation without modifying those provisions.

The challenged regulations "fill in the interstices" of the legislative mandate (see, Versailles Realty, 76 NY2d at 329) by redefining the protected class of people to include those who, in DHCR's experience as sole administrator of residential rent regulation and adjudicator of eviction disputes, are most in need of protection against loss of their homes in a continuing housing emergency. Adjustment of the existing scheme in light of the agency's technical competence is well within the proper rulemaking function of this agency. Moreover, unlike the Public Health Council in Boreali, DHCR has not enacted categorical exemptions reflecting accommodations to special interest groups.

Finally, although appellants point to 27 bills introduced in the legislature between 1986 and 1989 relating to succession rights, the legislature has not sought to alter succession rights in the years following DHCR's emergency and later permanent regulations (see also, Festa, 145 AD2d at 63). Of particular significance is the fact that the legislature this year made substantial reforms in rent regulation, including decontrol of luxury units, without addressing noneviction protection (see, Rent Regulation Reform Act of 1993, L 1993, ch 253). We cannot agree with appellants that, in these circumstances, the failed bills alone warrant the conclusion that the agency has exceeded its mandate (see also, Boreali, 71 NY2d at 11).

Thus, we reject appellants' contention that DHCR acted beyond its authority.

IV.

Appellants next urge that the challenged regulations are unconstitutional on their face because, without just compensation, they require owners of rent-regulated housing to suffer a permanent physical occupation of their property; deprive them of the beneficial use of their property; and fail to substantially advance a legitimate governmental objective (see, NY Const, art I, § 7 [a]; US Const, 5th Amend).

This appeal does not put before us the question whether rent regulation itself constitutes a taking -- a question that has excited recent scholarly interest (see, e.g., Radford, Regulatory Takings Law in the 1990's: The Death of Rent Control?, 21 Sw U L Rev 1019 [1992]; Note, Bright Lines in the Big City: Seawall, Tenant Successions Rights, and the Jurisprudence of Takings, 91 Colum L Rev 609 [1991]; but see, Pennell v City of San Jose, 485 US 1, 12, n 6; Block v Hirsh, 256 US 135, 156; Loab Estates, Inc. v Druhe, 300 NY 176, 180). Appellants challenge only the recent family-succession amendments to the rent control and rent stabilization regulations. We note, further, that in this facial challenge, appellants bear the heavy burden of overcoming the presumption of constitutionality that attaches to the challenged enactments (see, e.g., De St. Aubin v Flacke, 68 NY2d 66, 76; Loretto v Teleprompter Manhattan CATV Corp., 458 US 419, 440). Appellants have failed to sustain that burden.

A. Physical Occupation

Governmental action that compels an owner to endure a permanent physical occupation of its property effects an unconstitutional taking per se (see, Yee, 503 US at ____ [112 S Ct at 1526]; Loretto, 458 US at 434-435). Appellants claim that they are forced by the new regulations to accept strangers as tenants and that these tenancies, no longer restricted to blood-or-marriage relatives of the original tenant, will exist in perpetuity. Because the

co-residency requirement in the case of a tenant who voluntarily vacates has been reduced to the shorter of two years (one year in the case of elderly or disabled tenants) or the inception of the tenancy or commencement of the relationship, appellants further complain that the new regulations make it easier to qualify for protection.

At the outset, we are unpersuaded by the argument that the new regulations have created perpetual tenancies. An owner's right to evict an unsatisfactory tenant or convert rent-regulated property to other uses remains unaffected (see, 9 NYCRR 2104, 2204, 2504, 2524; Yee, 503 US at ____ [112 S Ct at 1528-1529]). That a rent-regulated tenancy might itself be of indefinite duration--as has long been the case under rent control and rent stabilization--does not, without more, render it a permanent physical occupation of property (see, Manheim, Tenant Eviction Protection and the Takings Clause, 1989 Wisc L Rev 925, 991-993 [1989]).

Nor does the fact that an owner must offer a renewal lease to a departed tenant's newly-defined family member--potentially a stranger to the owner--give rise to such a physical occupation (see, Yee, 503 US at ____ [112 S Ct at 1528]). In Seawall Assocs. v City of New York (74 NY2d 92, 105, cert denied 493 US 976), we held that Local Law 9, which required owners of single room occupancy housing accommodations to rehabilitate and rent out their units, forcing them "to subject their properties to a use which they neither planned nor desired," constituted a physical taking per se. By contrast, in Yee, the Supreme Court held that requiring owners of mobile home parks to rent the "pad" beneath a mobile home at controlled rents to any purchaser of the mobile home did not constitute a physical occupation because the owners had "voluntar[ily] open[ed] their property to occupation by others" and thus could not "assert a per se right to compensation based on their

inability to exclude particular individuals" (Yee, 503 US at ____ [112 S Ct at 1530]).

The difference -- dispositive here -- between requiring an owner to accept a purported stranger as a tenant and compelling the owner to rent out single room occupancy accommodations is in the owner's voluntary acquiescence in the use of its property for rental housing (see, Yee, 503 US at ____; Federal Communications Commn. v Florida Power Corp., 480 US 245, 252-253; see also, Seawall, 74 NY2d at 105). As we noted in Seawall, "it is the forced occupation[,] * * * not the identities of the new tenants or the terms of the leases, which deprives the owners of their possessory interests and results in physical takings" (Seawall, 74 NY2d at 106). Indeed, once a property owner decides to rent to tenants, the antidiscrimination laws eliminate an owner's unfettered discretion in rejecting tenants (see, Yee, 503 US at ____ [112 S Ct at 1530]; see also, Heart of Atlanta Motel, Inc. v United States, 379 US 241; Manheim, Tenant Eviction Protection and the Takings Clause, 1989 Wisc L Rev at 997-998).

In any event, a "family member" for noneviction purposes, applying all of the criteria established by DHCR, is no more likely to be a stranger to the owner than a family member as formerly defined. This is so because, under either definition, the family member entitled to noneviction protection must have occupied the apartment with the tenant of record in a long-term, committed relationship (to be determined on a case-by-case basis in accordance with the specified criteria). In fact, the challenged regulations additionally permit the owner to request, when offering a renewal lease, the names of all co-occupants and whether they qualify as family members (9 NYCRR 2104.6 [d] [2], 2204.6 [d] [2], 2503.5 [e], 2523.5 [e]).

Because the challenged regulations may require the owner-lessor to accept a new occupant but not a new use

of its rent-regulated property, we conclude that appellants have failed to establish their claim that, facially, a permanent physical occupation of appellants' property has been effected.

B. Regulatory Taking

As an alternative facial challenge, appellants urge that the regulations effect an impermissible regulatory taking, which occurs when governmental action forces some people alone to bear burdens that, in fairness, ought to be borne by society at large (see, Seawall, 74 NY2d at 107). Regulation of private property constitutes an unconstitutional taking if it denies an owner economically viable use of the property (a per se regulatory taking), or if it does not substantially advance legitimate State interests (Seawall, 74 NY2d at 107; Lucas, 505 US at ____ [112 S Ct at 2893]; Nollan v California Coastal Commn., 483 US 825, 834).

Appellants claim, first, that the new regulations deprive them of both the benefit of rental increases that occur upon vacancy and the reversionary interest in their property. However, a regulation effects a per se regulatory taking only in the relatively rare situation where "the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave [the] property economically idle" (Lucas, 505 US at ____ [112 S Ct at 2895]). Here, the regulations do not affect the owner's right to receive the regulated rents, unchallenged as a reasonable return. Moreover, because the tenancies are not perpetual (as discussed above), the owners are not deprived of their reversionary interest (compare, 520 E. 81st St. Assocs. v Lenox Hill Hosp., 157 AD2d 138, 150, revd on other grounds 77 NY2d 944). We thus conclude that the owners have not met their burden of showing the requisite deprivation of economically beneficial use of their property

(see, Lucas, 505 US at ____ [112 S Ct at 2893, n 6]).

Alternatively, appellants maintain that DHCR has failed to demonstrate the challenged regulations substantially advance the concededly legitimate governmental objectives of prevention of unwarranted evictions and alleviation of homelessness (see, Seawall, 74 NY2d at 111). The absence of a close causal nexus between a regulated use of the property and the problem sought to be ameliorated may invalidate a regulation (see, Nollan, 483 US at 837). The owners insist that rent regulation perpetuates rather than alleviates the housing shortage in New York, citing evidence that, faced with a lower overall return from a building, owners will invest less in repairs, hastening the building's deterioration.

The question before us, however, is not the general wisdom or desirability of present rent regulation (the statutes and regulations combined) to address the State's housing situation -- that is a question for the legislature. Rather, the question we decide is whether there is a close casual nexus between the challenged regulations and the stated purpose of preventing the eviction and resulting vulnerability to homelessness of the identified beneficiaries (see, Nollan, 483 US at 837; Seawall, 74 NY2d at 112). We agree with the Appellate Division that there is.

People who would, absent the regulations, be threatened with eviction from their homes may now have the right to remain. In Seawall, on the other hand, forcing owners to let single room occupancy accommodations did not substantially advance the City's interest in alleviating homelessness because those units would not necessarily have been rented to homeless or potentially homeless persons (Seawall, 74 NY2d at 111, 112, n 11). The designation of classes of individuals to whom DHCR has extended noneviction protection--persons deemed by the agency to be threatened with loss of their homes, and therefore in need

of such protection--is a matter that falls within the agency's expertise (see, Teachers Ins. and Annuity Assn. v Landmarks Preservation Commn., 82 NY2d 35, ____).[4]

Thus, we conclude that no unconstitutional taking has been demonstrated.

V.

Appellants' miscellaneous points are without merit. DHCR has complied with the State Administrative Procedure Act: appellants do not dispute that DHCR filed the proposed regulations with the Secretary of State, submitted a notice of adoption for publication in the State Register, issued appropriate regulatory impact statements and other analyses and held a public hearing (see, State Administrative Procedure Act §§ 202, 202-a). Nor do we agree that the regulations are impermissibly vague. The factors to be considered in determining the existence of a qualifying relationship are objective, detailed and specific, and provide ample guidance in identifying the commencement of the relationship despite the absence of a marriage certificate or other legal document. Appellants' remaining contentions are without merit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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[4] As we noted in Seawall (74 NY2d at 107, n 6), examination of the owners' "reasonable investment-backed expectations" (see, Lucas, 550 US at ____ [112 S ct at 2895 n 8]; Penn Cent. Transp. Co. v New York City, 438 US 104, 124) is not relevant to a facial challenge involving a per se regulatory taking. Were we to examine appellants' expectations in assessing their broader facial challenge, we would conclude in any event that frustration of their asserted "expectation"--that the class of persons entitled to noneviction protection would not be enlarged--is insufficient to satisfy their burden in establishing a taking (see, Penn Cent., 438 US at 136; see also, Manheim, Tenant Eviction Protection and the Takings Clause, 1989 Wisc L Rev at 971).

APPENDIX A

[Opinion And Order of New York Court of Appeals 1993]

#259 - Rent Stabilization
of NYC v. Higgins

BELLACOSA, J. (concurring):

Chief Judge Kaye's Opinion of the Court cogently distinguishes respondents' regulations, challenged on this record, from the respective constitutional limitations on governmental actions found to have been violated in Boreali v Axelrod (71 NY2d 1) and Seawall Assocs. v City of New York (74 NY2d 92, cert denied 493 US 976). I therefore concur and join fully in her Opinion. Because I perceive significant practical and governance concerns that merit close attention as an outgrowth of this decision, I add these observations.

In the distribution and delegation of governmental powers, it is quite momentous that any administrative agency should possess the potent public policy power to extend the durational and relational sweep of the plurality rationale of Braschi v Stahl Assocs. Co. (74 NY2d 201), including fully into the rent stabilization category and more widely than was allowed even in the rent control field of that case. The case-by-case application of this judicially-approved regulatory initiative adds layers of great sensitivity and breadth to the implementation of this case. However high-purposed, well-intentioned and possessed of special expertise respondents' agency is, the societal equation is delicately weighted with practical, legal and fiscal consequences on all sides. Thus, while I also agree with the chief Judge's acknowledgement of the primacy of legislative choices in the field (Majority opn, at 17), I believe it useful to go farther and urge the Legislature to carefully assess the sweeping power it impliedly invested in this administrative agency in the execution of a unique human sheltering mission.

In a similar cautionary frame of thought with respect to ensuing judicial branch responsibilities, I also believe that as-applied controversies under the challenged regulations, in contradistinction to the facial challenge of this case, will be profound (Seawall Assocs. v City of New York, 74 NY2d 92, supra). Diminution of alienation and value of affected properties, examined under an as-applied microscope, are bound to seriously affect many people, landlords and tenants alike, and the availability of sufficient, appropriate and affordable dwelling places. It would seem that as-applied challenges will inevitably compel courts to examine tenancy sequences in potentially long and somewhat indefinite time lines and relationships. This will be complicated by the substantial administrative, quasi-adjudicative tasks necessarily implicated. It is virtually certain that long, successive successorships to rent stabilized leaseholds will not be just theoretical possibilities because, markets being markets, they are likely to bloom as perennials, becoming functionally transformed into perpetual stakeholds. The Legislature should satisfy itself, as the courts will have to, that unwarranted de facto results from administrative quasi-judicial determinations do not constitute the functional equivalent of divestitures from landowners of reversionary rights to their properties without just compensation and due process.

* *

Order affirmed, with costs. Opinion by Chief Judge Kaye. Judges Simons, Titone, Hancock, Bellacosa and Levine concur, Judge Bellacosa in a separate opinion. Judge Smith took no part.

Decided December 21, 1993

Appendix B - Decision And Order of Affirmance of The Appellate Division, First Judicial Department, Dated January 12, 1993 (189 A.D. 2d 594) [Pages 18a - 19a]

APPELLATE DIVISION, SUPREME COURT
FIRST DEPARTMENT

January 12, 1993

The Court announces the following decisions:

Murphy P.J., Ellerin, Kupferman, Kassal, Rubin, JJ.

47228 -
47230 Rent Stabilization Association of New York City, Inc., et al.,
Plaintiffs-Appellants,

-and-

Small Property Owners of New York,
Plaintiff-Intervenor-Appellant,

-against-

Richard L. Higgins, etc.,
Defendant-Respondent,

-and-

Robert Wells, et al.,
Defendants-Intervenors-Respondents.

Judgment of the Supreme Court, New York County (Irma Vidal Santaella, J.), entered November 27, 1991, declaring "family member" succession rights regulations promulgated by respondent to be a valid exercise of its

administrative power, unanimously affirmed, without costs.

The regulations in question are valid for the reasons set forth in this Court's opinion on the application for a preliminary injunction (164 AD2d 283). Even under the heightened scrutiny applicable to regulatory takings, the regulations substantially advance a legitimate governmental interest (see, Nollan v California Coastal Commn., 483 US 825, 834).

Subsequent decisions in Lucas v South Carolina Coastal Council (___ US ___, 112 S Ct 2886) and Yee v City of Escondido (___ US ___, 112 S Ct 1522) do not, in this instance, warrant a departure from our prior conclusion that plaintiffs' challenge to the administrative regulations lacks merit (see, Hanover Ins. Co. v D & W Central Station Alarm Co., 164 AD2d 112, 115).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: January 12, 1993

s/_____

C.O.W.

Deputy Clerk

Appendix C - Decision And Order of The Appellate Division, First Judicial Department, Entered December 4, 1990 (164 A.D.2d 283) [Pages 20a - 37a]

Supreme Court of The State of New York

APPELLATE DIVISION - FIRST JUDICIAL DEPARTMENT

RENT STABILIZATION ASSOCIATION OF NEW YORK, INC., et al., Respondent, and SMALL PROPERTY OWNERS OF NEW YORK, Intervenor-Respondent, v RICHARD L. HIGGINS, as Commissioner of the New York State Division of Housing and Community Renewal, Appellant, and ROBERT WELLS et al., Intervenors-Appellants.

RENT STABILIZATION ASSOCIATION OF NEW YORK, INC., et al., Appellants, and SMALL PROPERTY OWNERS OF NEW YORK, Intervenor, v RICHARD L. HIGGINS, as Commissioner of the New York State Division of Housing and Community Renewal, Respondent, and ROBERT WELLS et al., Intervenors-Respondents.

First Department, December 4, 1990

OPINION OF THE COURT

Ross, J. P.

The primary issue on these appeals is whether the IAS court properly enjoined the implementation of the

emergency rule and subsequent amendment to the State Division of Housing and Community Renewal's permanent regulations, adopted in order to conform and/or broaden the administrative regulations governing lease succession rights and antieviction protections, under the State and City of New York rent control and rent stabilization systems, in accordance with the Court of Appeals decision in *Braschi v Stahl Assocs. Co.* (74 NY2d 201).

In *Braschi v Stahl Assocs. Co. (supra)*, the court held that the term "family" as used in section 2204.6 (d) of the New York City Rent and Eviction Regulations (9 NYCRR 2204.6 [d]), includes "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence" (74 NY2d, at 211). On November 9, 1989, the State Division of Housing and Community Renewal (DHCR) began the process of amending the four sets of administrative regulations under its administration,[1] to provide for leasehold succession rights in accordance with the broad definition of the term "family" set out in *Braschi v Stahl Assoc. Co. (supra)* by promulgating an emergency rule applicable to all four sets of regulations. The emergency rule broadened the definition of family members entitled to succession rights to include, in addition to those traditional relations previously named, those individuals residing in the housing accommodation, with the tenant of record, as a

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[1] (1) The State Rent and Eviction Regulations (9 NYCRR parts 2100-2109 [rent control outside of New York City]); (2) the New York City Rent and Eviction Regulations (9 NYCRR parts 2200-2210 [rent control within New York City]); (3) the Emergency Tenant Protection Regulations (9 NYCRR parts 2500-2510 [rent stabilization outside New York City]); (4) the Rent Stabilization Code (9 NYCRR parts 2520-2530 [rent stabilization within New York City]); *see*, McKinney's Uncons Laws of NY, Book 65 (§§ 8581-8700).

primary residence, who can prove emotional and financial commitment and interdependence between themselves and the tenant of record. The rule lists the following eight factors to be considered in determining whether the requisite emotional and financial commitment and interdependence existed: length of relationship; sharing of expenses; intermingling of finances; engaging in family-type activities; formalization of legal obligations and responsibilities between the two parties; holding themselves out as family members through words or acts; regular performance of family functions; and any other pattern of behavior which evidences the intention of creating a long-term, emotionally committed relationship. Whereas, prior rent stabilization regulations provided for succession either, where the family member of the named tenant has resided in the housing accommodation as a primary resident from the inception of the tenancy or commencement of the relationship, and the named tenant vacates the premises (Rent Stabilization Code [9 NYCRR] § 2523.5 [b][1]) or, where a family member has resided with such tenant in the housing accommodation as a primary resident for a period of no less than two years immediately prior to the death of the tenant (9 NYCRR 2523.5 [b] [2]),[2] the emergency rule eliminated the distinction between the tenant of record's death and the tenant of record's departure. In either case,

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[2] The above-cited regulations were enacted in May 1987 in order to conform the Rent Stabilization Law to the Rent Control Law, which prohibited the eviction of an occupant of a rent-controlled housing accommodation who had been living with the tenant, and was either a surviving spouse or some other member of the deceased tenant's family. (State Rent and Eviction Regulations § 56 [4], renum 9 NYCRR 2104.6 [d].) The rent control regulations for the City of New York contained the same provision (9 NYCRR 2204.6 [d]). This court upheld the rent stabilization regulations concerning succession rights in *Festa v Leshen* (145 AD2d 49).

APPENDIX C
[Decision And Order of App. Div. 1st Dep't 1990]

the family member would succeed to the rights of the tenant of record upon the tenant of record's permanent vacatur of the housing accommodation provided the family member resided with the tenant of record as a primary resident, either for not less than two years (one year in the case of senior citizens [62 years or older] and disabled persons) or from the inception of the tenancy or commencement of the relationship (if the tenancy or relationship were less than two years, or one year old, as the case may be).

Plaintiffs commenced the within declaratory judgment action seeking a declaration that the emergency rule is null and void, ultra vires and unconstitutional, as a taking of property without just compensation. The complaint also alleges that the rule violated Real Property Law § 226-b which regulates the assignment of leases; Real Property Law § 235-f which creates a right of occupancy but not leasehold rights for roommates; Domestic Relations Law § 11 which sets out the requirements and means for the solemnization of a marriage; and the administrative limitations in the Omnibus Housing Act of 1983, and the Sate Administrative Procedure Act.

By order to show cause dated November 13, 1989, plaintiffs moved in Supreme Court, Albany County, for a preliminary injunction enjoining the implementation of the emergency rule. An order to show cause was granted, which restrained the DHCR from "implementing or effectuating said Emergency Rule, or in any other manner promulgating, issuing, implementing or effectuating the terms, conditions or requirements thereof," but made the motion returnable in Supreme Court, New York County.

On November 15, 1989, counsel for the plaintiffs and the DHCR entered into a stipulation which provided that the November 13, 1989 order to show cause would not be construed to preclude the DHCR from taking ministerial

actions necessary to comply with the procedures required for the promulgation of the regulatory amendments, which are the subject of this action, such as the filing of required regulatory impact statements and regulatory flexibility analyses with the Secretary of State. On December 13, 1989, the New York County IAS court heard argument, and again extended the TRO pending determination of the preliminary injunction motion. During oral argument on the motion, the court was informed that the DHCR was in the process of promulgating permanent regulations and had already sent out notices that a public hearing was scheduled for January 22, 1990.

On February 7, 1990, the DHCR filed with the Secretary of State for a 60-day extension of the emergency rule, and on March 20, 1990 the DHCR filed permanent regulations with the Secretary of State, identical in substance to the emergency rule. Plaintiffs, by order to show cause, moved for a preliminary injunction enjoining the implementation of the permanent regulation on the same grounds used to attack the emergency regulation, and for leave to file a supplemental complaint to assert causes of action against the permanent regulations. Plaintiffs also served a demand for compliance with CPLR 5104, claiming that the promulgation of the permanent regulations violated the original TRO.

In the interim, on March 19, 1990 the defendant-intervenors moved by order to show cause to vacate the TRO on the ground that this court's March 13, 1990 decision in *East 10th St. Assocs. v Estate of Goldstein* (154 AD2d 142) established conclusively the lack of plaintiff's likelihood of success on the merits. In *East 10th St. Assocs. v Estate of Goldstein (supra)*, this court held that the extended definition of "family" set out in *Braschi v Stahl Assocs. Co. (supra)* and applied therein to a rent-controlled apartment, also controlled in the case of a rent-stabilized

apartment in New York City, since "there is no significant distinction between the two regulatory schemes which would mandate a different definition of [the term] 'Family'" (*East 10th St. Assocs. v Estate of Goldstein, supra,* at 145).

[1] On April 4, 1990, the permanent regulations were published effective immediately. The IAS court, in an order entered April 10, 1990, provided that the TRO imposed by the Supreme Court, Albany County, on November 13, 1989 was extended to cover the permanent regulations, pending the court's determination of the plaintiff's motion for a preliminary injunction. The DHCR appealed. Plaintiffs moved in this court for an order dismissing the appeal from the April 20, 1990 order on the ground that it was a nonappeable temporary restraining order. Alternatively, plaintiffs sought to vacate the CPLR 5519 (a)(1) stay. By order entered May 15, 1990 this court, *sua sponte*, deemed the order entered April 20, 1990 as one which granted a preliminary injunction, and provided that the statutory stay would be vacated unless the appeal was perfected for the October 1990 term of this court. The Plaintiffs' challenge to the regulations is based to a large extent, upon their contentions that the promulgation of the challenged regulations is beyond the scope of the DCHR's rule-making authority, and that the regulations are contrary to the expressed legislative intention and policy, in the areas of lease succession rights, and domestic relations.[3] We disagree.

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[3] We have a most unusual situation in that at least 10 briefs (4 of them by *amicus curiae*) have been submitted with reference to the merits of the permanent regulations, as well as four briefs with reference to the question of contempt, where the IAS court is yet to write a single sentence on either issue. Nevertheless, we must accept appeal No. 1 (rather than dismiss same), as in our previous denial of plaintiffs' motion to dismiss that appeal, we *sua sponte* deemed that appeal to be from a grant of a preliminary injunction, which was the eventual result of repeated extensions of the TRO.

APPENDIX C

[Decision And Order of App. Div. 1st Dep't 1990]

For the following reasons, we reverse the order entered April 20, 1990, and vacate the preliminary injunction enjoining the implementation of the permanent regulations, and decline to review the denial of the order to show cause seeking to hold the respondent Commissioner in contempt.

Fundamental to a party's entitlement to a preliminary injunction is a demonstration that the party has a likelihood of success on the merits. (*Grant Co. v Srogi*, 52 NY2d 496, 517.) We are guided here, as we were in *Festa v Leshen* (145 AD2d 49, 55), by the standard of judicial review set forth in *Ostrer v Schenck* (41 NY2d 782, 786): "The function of a reviewing court is a limited one. The challenger of a regulation must establish that the regulation 'is so lacking in reason for its promulgation that it is essentially arbitrary.'" As this court has recognized in the past, an administrative agency may not, in the exercise of its rule-making authority, promulgate a regulation out of harmony with the plain meaning of statutory language. (*Festa v Leshen, supra,* at 55; *see, Matter of Lower Manhattan Loft Tenants v New York City Loft Bd.*, 104 AD2d 223, 225, *affd* 66 NY2d 298; *see also, Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471, 480-481; *Matter of Jones v Berman*, 37 NY2d 42, 53.) "Similarly, an agency may not, in excess of its lawfully delegated authority, promulgate rules and regulations for application to situations not within the intendment of the statute." (*Festa v Leshen, supra,* at 55; *see Boreali v Axelrod*, 72 NY2d 1; *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 NY2d 588, 595.)

This Court has specifically stated that the succession provisions to which the challenged regulations were added are "'remedial in nature'" and "'should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible.'" (*Festa v Leshen,*

supra, at 56, quoting *Lesser v Park 65 Realty Corp.*, 140 AD2d 169, 173.) In *Festa v Leshen (supra*, at 56), this court held that the DHCR acted rationally and within the scope of its lawfully delegated authority in promulgating the Rent Stabilization Code amendments, which provided that relatives who reside with the named tenant may succeed to the tenant's lease rights, upon the tenant's death or abandonment of the dwelling. It was therein noted that the DHCR was delegated the authority, by the Legislature, to amend the Rent Stabilization Code and to adopt a code which, in general, protects tenants and the public interest (*supra*, 145 AD2d, at 56). We specifically found that the regulations challenged in *Festa v Leshen (supra)* were enacted in a legitimate exercise of its authority, in order to avoid a "grievous harm" to the family members of the tenants of record, in rent-stabilized apartments, who die or abandon the family dwelling. We stated: "The challenged regulations reflect DHCR's measured response to the *Sullivan* decision (66 NY2d 489, *supra*), which had the potential to expose spouses and children to summary eviction with little or no hope of finding affordable housing in New York City. Such a situation surely posed at least as serious as threat 'to the public health, safety and general welfare' (Administrative Code § YY51-1.0) as the eviction of the named tenant with whom they resided. The succession provisions adopted by DHCR, designed to prevent just such a situation, thus effectively advanced the purposes for which the Rent Stabilization Law was enacted. Indeed, as this court recognized in *Lesser v Park 65 Realty Corp. (supra*, 140 AD2d, at 173), the succession provisions 'were included in the new Code to prevent the grievous harm that would ensue from the wholesale eviction of family members which would otherwise be permitted under the law as set forth in the *Sullivan* decision *(supra)* and to address the inadequacies in this area of the law in light of its history.'"

(145 AD2d, at 56-57.)

In *Braschi v Stahl Assocs. Co. (supra)*, the Court of Appeals extended the same noneviction protection already afforded spouses and members of the named tenant's "family" under the New York City Rent and Eviction Regulations to "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." (*Braschi v Stahl Assocs. Co., supra*, at 211.) In *East 10th St. Assocs. v Estate of Goldstein* (154 AD2d 142, *supra*), this court found the *Braschi* decision *(supra)* to be controlling precedent which required that the *Braschi* definition of family be applied in rent stabilization cases. Apart from the fact that rent stabilization is generally acknowledged as a "less onerous" system than rent control (*Sullivan v Brevard Assocs.*, 66 NY2d 489, 494), this court noted that "there is no significant distinction between the two regulatory schemes which would mandate a different definition of 'family'" (154 AD2d, at 145). We noted as well that the court in *Braschi (supra)* specifically placed its statement expanding the definition of the word "family", " '[i]n the context of eviction '", *not* 'in the context of evicition from a rent controlled apartment '". (154 AD2d, at 145.) We then concluded that "[i]t would be anomalous to hold that a life partner could be a valid family member for the purpose of protection from eviction from a rent-controlled apartment but not a valid family member insofar as eviction from a rent-stabilized apartment is concerned" (*supra*, at 145).

Inasmuch as the challenged regulations represent a codification of the Court of Appeals decision in *Braschi v Stahl Assocs. Co. (supra)* and of this court's decision in *East 10th St. Assocs. v Estate of Goldstein (supra)* and are a response to substantially the same public needs as the succession provisions approved in *Festa v Leshen (supra)*, there is little likelihood that plaintiffs will succeed on the

merits of their challenge to the regulations on the grounds that their promulgation violates the policy of the statute which created the DHCR and exceeds the delegated authority of the agency. It is clear also that plaintiffs' challenge based upon the provision of the Omnibus Housing Act of 1983 (L 1983, ch 403, § 9) which provides that no provision of the Rent Stabilization Code "shall impair or diminish any right or remedy granted to any party by this law or any other provision of law" will not ultimately succeed.

[2] This court in *Festa v Leshen (supra*, at 60-61) held that the provision was not a bar to the creation of succession rights for traditional family members. We stated that the fact '[t]hat no statute or regulation had previously restricted the contractual rights of landlords to evict the family members of a tenant who had died or vacated rent-stabilized premises does not constitute the granting of a right. Rights are not conferred by the absence of a regulation." (145 AD2d, at 61.) We further noted that "by delegating to DHCR the authority to adopt an amendment to the Code which 'protects tenants and the public interest' (Administrative Code § 26-511[c][1], formerly § YY51-6.0 [c][1]), the Legislature clearly provided the agency with a broad mandate, which would inevitably require some changes in the legal relationship between landlords and tenants. The statutory proscription against the impairment of existing rights was intended to assure that any such changes be not inconsistent with the Rent Stabilization Law or any other law." (*Festa v Leshen, supra*, at 61.) As with the succession provisions at issue in *Festa v Leshen (supra)* the challenged provisions satisfy this requirement. By responding to the continuing shortage of low- and middle-income housing units available, the rise in instances of individuals "doubling up" and tenants being forced into a homeless situation due to unaffordable rents, the regulations clearly

comport with the broad mandate provided the DHCR by the Legislature to "protect * * * tenants and the public interest". Since the new regulations incorporate the *Braschi* definition of "family" into the existing regulatory scheme, they do not conflict with Real Property Law § 226-b, which governs the assignment of leases, or with Real Property Law § 235-f (2), which makes it "unlawful for a landlord to restrict occupancy of residential premises, by express lease terms or otherwise, to a tenant or tenants or to such tenants and immediate family". The regulations deal with succession to leasehold rights, and with "family members" whether or not related by blood or law who have always treated the apartment as their family home, as opposed to "roommates". In *Braschi v Stahl Assocs. Co. (supra*, at 212) the court noted that the approach mandated by its decision would "foster the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates (*see*, Real Property Law § 235-f; *Yorkshire Towers Co. v Harpster*, 134 Misc 2d 384) or newly discovered relatives hoping to inherit the rent-controlled apartment after the existing tenant's death."

[3] The argument that the regulations conflict with Domestic Relations Law § 11 requiring solemnization of a marriage is meritless, as the regulations do not remotely attempt to equate the special relationship defined therein as spousal, and specifically distinguish "husband" and "wife" from that relationship. The regulations do not attempt to confer any other protection or privilege than the protection from eviction upon the death or departure of the tenant of record.

Plaintiffs broadly contend that promulgation of the permanent regulation violates the doctrine of separation of powers, arguing that the DHCR overstepped the boundary of proper administrative rule making and entered the realm

of legislative policy making. The basis for plaintiffs' claim is that since 1986 there have been approximately 27 bills introduced in the State Legislature concerning succession by "family members" and individuals "residing with" the tenant of record to the tenant's lease rights in rent-regulated apartments, non of which were passed. Plaintiffs view the presentation and debate of such bills without the passage of any legislation as a tacit pronouncement of policy by the Legislature on the subject covered by the challenged regulations. Plaintiffs submit no authority for such argument.

[4] While the line between administrative rule making and legislative policy making has been described as difficult to define in some cases (*Boreali v Axelrod*, 71 NY2d 1, 11), such is not the case here. The court in *Boreali* invalidated a comprehensive Public Health Council (PHC) code regulating tobacco smoking in areas open to the public, finding on the basis of four "coalescing circumstances" that the "difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed" (*supra*, 71 NY2d, at 11) in that the regulations were enacted without legislative guidance in an area, where the Legislature had tried and failed to reach an agreement, and were riddled with exceptions based solely on economic and social concerns. By contrast, the regulations herein were enacted in response to the pronouncements of the Court of Appeals, in an area within the particular expertise of the agency and do not contain any exceptions but, rather, uniformly advance the policies of the regulatory scheme according to the mandate given the agency by the Legislature.

Plaintiffs, for the first time on appeal, argue that the permanent regulations are impermissibly vague because they provide no criteria for determining when a nontraditional relationship commences. The standards for evaluating

vagueness were enunciated in *Grayned v City of Rockford* (408 US 104, 108-109): "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application".

These standards however, are not to be applied mechanically. "The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow" (*Hoffman Estates v Flipside, Hoffman Estates*, 455 US 489, 498).

[5] Here, the challenged regulations set out eight specified factors to be employed in determining whether a family relationship exists. These factors are sufficiently definite to give a person of "ordinary intelligence" a "reasonable opportunity" to make that determination. The question of when such a relationship commences is, contrary to plaintiffs' view, a relatively straightforward factual one, which can be determined in terms of those same eight factors. Aspects of the relationship from the date intermingling and joint ownership of assets began, to when the two individuals began a close relationship with each other's relatives can be examined to determine when the "family relationship" truly commenced. To the extent that

the regulations codify the *Braschi* decision they draw "a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates * * * or newly discovered relatives hoping to inherit the rent-controlled [or rent-stabilized] apartment after the existing tenant's death [or departure]" (*see, Braschi v Stahl Assocs. Co., supra*, at 212), and provide definite means with which to draw that distinction.[4]

Plaintiffs advance various constitutional challenges to the regulations all based on the contention that the regulations effect unconstitutional physical and/or regulatory takings which effectively deprive the landlord of the use of the property indefinitely, without just compensation. Plaintiffs argue that the regulations violate the constitutional guarantee against the taking of private property for public use without just compensation by "removing all control from the landlord and placing permanent occupancy, dominion and control over the landlord's property with the tenant". This conclusion is based upon the plaintiffs' view that the regulations permit "permanent and multi-generational occupancy by strangers."

[6] The New York State Court of Appeals and the United States Supreme Court have upheld rent-control and similar regulation of housing conditions and other aspects of the landlord-tenant relationship (*see, Bowles v Willingham*, 321 US 503, 517-518; *Loab Estates v Druhe*, 300 NY 176, 180; *Levy Leasing Co. v Siegel*, 258 US 242; *Block v Hirsh*, 256 US 135). The challenged regulations do not

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[4] The argument advanced by plaintiffs that there is no basis upon which to protect family members of tenants of record who abandon the apartment rather than die is meritless. *Matter of Herzog v Joy*, (53 NY2d 821, *affg* 74 AD2d 372), *Festa v Leshen (supra)* and *Braschi (supra)* make clear that the distinction between death and abandonment of the premises by the tenant of record, has itself been abandoned by the counts.

fundamentally change the nature of the rent control and rent stabilizations systems so as to authorize "the permanent occupation of the landlord's property by a third party" of the sort, which traditionally, has been held to be a "taking" (*see, Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419, 440, 441). These regulations expand the definition of those individuals entitled to succeed to the tenant-of-record's lease rights by virtue of their familial relationship with the tenant. Like rent control and other regulations that have been upheld by this court, the Court of Appeals and the United States Supreme Court, the regulations herein involve "restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing" (*see, Seawall Assocs. v City of New York*, 74 NY2d 92, 105, *cert denied* ___ US ___, 110 S Ct 500). Thus they are to be distinguished from the regulations at issue in *Seawall Assocs. v City of New York (supra)* which were found by the Court of Appeals to force owners to subject their properties to a use which they neither planned nor desired (*Seawall Assocs. v City of New York, supra*, at 105),[5] and to offer their properties for rent as SRO units to persons with whom they had no existing landlord-tenant relationship. The plaintiffs' fear that the nature of the nontraditional relationship, as defined in the regulations, will permit "permanent and multi-generational occupancy by strangers" is an unfounded one, apparently based, in part at least, on the assumption that the regulations allow room for fraud. The permanency of the occupancy by the nontraditional family member is no

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[5] The statute struck down by the Court of Appeals in *Seawall (supra)* imposed a moratorium on the demolition or conversion of structures containing SRO (single-room occupancy) units and required owners of SRO properties to rehabilitate all vacant units and offer them for rent. The statute imposed substantial monetary penalties for noncompliance.

greater than that of a traditional family member. Moreover, the definition of the relationship provided in the regulation is not so nonspecific or general as to allow for abuse. The successors to the tenant's lease rights must demonstrate a close, "familial" connection to the tenant and to the apartment. Thus such individuals are not mere "third-parties" or "strangers" to the tenancy.

Plaintiffs argument that the regulations effect an uncompensated regulatory taking is based upon the contention that the broadening of the definition of those entitled to succession rights denies the landlords the economically viable use of the properties, by effectively extinguishing the landlords expectation of a residual or reversionary interest in the apartments. According to the plaintiffs this results because the regulations permit succession to a broad indefinite class of people predicated upon two years of occupancy or even less. As has already been discussed in connection with the "vagueness" argument advanced by the plaintiffs, it is clear that the regulations specifically define a narrow class of individuals who are entitled to succession.

The regulations here at issue are distinguishable from those involved in *520 E. 81st St. Assocs. v Lenox Hill Hosp.* (157 AD2d 138, *appeal withdrawn* 76 NY2d 851). In *520 E. 81st St. Assocs. v Lenox Hill Hosp. (supra)*, the regulations at issue provided an exception to the nonprimary residence exemption in the Rent Stabilization Law where a not-for-profit hospital is the lease's named tenant (L 1984, ch 940). This court found that because Lenox Hill Hospital had been in existence since June 29, 1918, and showed no signs of ceasing operations, the landlord was "effectively precluded from regaining possession of its property" primarily because Lenox Hill could use the apartments as a dormitory "in perpetuity" (*supra*, at 146, 147). Moreover this court found that by providing the

hospital with virtual fee interest in the property, the regulations as applied would increase "the dislocation of long-term tenants, thereby contravening the purpose of rent stabilization, by requiring Lenox Hill to remove long-term occupants if they terminate their employment with it" (*supra*, at 149). We stated that the policy of promoting better health care should not be "furthered by interpretating the Rent Stabilization Law so as to exacerbate the very housing emergency which rent stabilization was enacted to address" (*supra*, at 150).

The occupancy herein is necessarily limited by the lifetime of the succeeding "family member", which is no greater than that of any other traditional relation entitled to succession prior to *Braschi* (*supra*). The possession and use of the property in perpetuity is simply not a potential result herein. The landlord is not required to issue renewal leases to an institution with perpetual existence, but rather to natural persons, whose primary residence was already in the landlord's building. The plaintiffs have not shown that they will be able to demonstrate that the regulations prevent them from obtaining a reasonable return on their property. Moreover, unlike the regulations in 520 E. 81st St. Assocs. (*supra*) the regulations here at issue advance the intended purposes of the rent stabilization and rent control succession provisions - to prevent the eviction of individuals with substantial ties to their home-apartment and to the former tenant of record. Thus, since the plaintiffs will not be able to demonstrate that the regulations do not substantially advance a legitimate State interest or that they deny landlords economically viable use of their property (*see, Seawall Assocs. v City of New York, supra*, at 107), plaintiffs' challenge based upon the theory that the regulations constitute a regulatory taking will also necessarily fail.

Plaintiffs, though they have strenuously and

competently argued, have failed to demonstrate that they have a likelihood to succeed on the merits, in their challenge to the regulations. They are, therefore, not entitled to the injunctive relief that they were granted below (*Grant Co. v Srogi*, 52 NY2d 496, *supra*).

Accordingly, the order of Supreme Court, New York County (Irma Vidal Santaella, J.), entered April 20, 1990, and deemed as one granting a preliminary injunction, is reversed, on the law, the facts and in the exercise of discretion, and the injunction vacated, with costs. We decline to reach the plaintiffs' appeal from the order, entered April 10, 1990, which denied their application for an order holding the defendant Commissioner in contempt for allegedly violating the original temporary restraining order made with respect to the emergency rule, and dismiss that appeal as moot, without costs.

MILONAS, ASCH AND ELLERIN, JJ., concur.

Order, Supreme Court, New York County, entered April 20, 1990, reversed, on the law, the facts and in the exercise of discretion, and the injunction vacated, with costs. Appeal from order of said court entered on April 10, 1990, is dismissed as moot, without costs.

Appendix D - Decision And Final Judgment of The Supreme Court of The State of New York, County of New York, by Santaella, J., Entered November 27, 1991 [Pages 38a - 46a]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., THE DELANO VILLAGE COMPANIES, RIVERDALE GARDENS and COLISEUM PARK APARTMENTS CO.,	Index No. 24480/89
Plaintiffs,	
- and -	
SMALL PROPERTY OWNERS OF NEW YORK,	
Plaintiff-Intervenor,	
-against-	
RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal,	
Defendant,	
-and-	
ROBERT WELLS, et al.,	
Defendant-Intervenors.	

IRMA VIDAL SANTAELLA, J.:

APPENDIX D

[Decision And Final Judgment of NYS Sup. Ct. 1991]

Plaintiffs, including the Rent Stabilization Association of New York City, Inc. (RSA), the Delano Village Companies (Delano), Riverdale Gardens (Riverdale), and Coliseum Park Apartments Co. (Coliseum) owners (or operators) of housing accommodations subject to the Rent Stabilization Law and Code, move for summary judgment pursuant to CPLR 3212 in this declaratory judgment action by which they are challenging the promulgation of certain temporary and permanent amendments by defendant Higgins (succeeded by Aponte) as Commissioner of the New York State Division of Housing and Community Renewal (DHCR) as illegal, ultra vires, and unconstitutional, inter alia.

Defendant Aponte (DHCR) cross-moves for summary judgment pursuant to CPLR 3212 upon the verified supplemental complaint. Cross-motions for summary judgment have also been made by defendant-intervenors (Disabled in Action, Kairos Rencher, Janet Goodman, Gay Men's Health Crisis, Inc., Robert Wells and Everett Quinton). Brooklyn Office for the Aging also moves for summary judgment in its favor.

Plaintiffs in the verified supplemental complaint allege that DHCR promulgated emergency rules on November 8, 1989 amending the Rent Stabilization Code, the Emergency Tenant Protection Regulations, the New York City Rent and Eviction Regulations and the New York State Rent and Eviction Regulations.

The emergency rules were replaced by permanent amendments on March 20, 1990.

The parties' dispute centers around the regulation (9 NYCRR 2520.b[3]) which includes an expanded definition of "family" from the traditional meaning following the

decision of the New York Court of Appeals in **Braschi v Stahl Associates Company** (74 N.Y.2d 201), decided July 6, 1989. Braschi had shared a rent controlled apartment with Blanchard, for a number of years when the latter died and the landlord sought to evict Braschi as a licensee. Upon his motion for a preliminary injunction, the Supreme Court found entitlement to protection of the New York City Rent and Eviction Regulations (9 NYCRR 2204.6[d]), that Braschi was a family member within the regulations and granted preliminary injunctive relief. The Appellate Division, reversing, granted leave to appeal to the Court of Appeals upon a certified question of law as to whether it had properly reversed. The Court of Appeals reversed, stating that Braschi had not failed as a matter of law in showing a clear likelihood of ultimate success on the merits. The two men had been permanent life partners for years, had held themselves out socially to friends and family, had shared a household budget and maintained joint bank accounts and credit cards, inter alia. Braschi was the beneficiary of the deceased tenant's insurance policy and legatee and executor of his estate. A likelihood of success on the merits was found, Braschi was not simply a roommate and was entitled to noneviction protection.

The contested regulation, 9 NYCRR 2520.6(o) herein which tracks the language of Braschi is as follows:

> (o) Family member. (1) A husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant; or
>
> (2) Any other person residing with the tenant or permanent tenant in the housing

accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed, may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such persons be required or considered:

(i) longevity of the relationship;

(ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;

(iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget or purposes of receiving government benefits, etc.;

(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;

(v) formalizing of legal obligations, intentions and responsibilities to each other by such means as executing wills naming each other an executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

(vi) holding themselves out as family members to other family members, friends, members of the community or religious

institutions, or society in general, through their words or actions;

(vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;

(viii) engaging in any other pattern of behavior, agreement or other action which evidences the intention of creating a long-term, emotionally committed relationship.

Plaintiffs allege that the amended regulation permit persons who are not the tenants of record to acquire tenancy rights; that tenancy succession was drastically changed by the amendment from that of the May, 1987 code allowing individuals related to the tenant by blood or marriage to succeed to the tenancy if the prime tenant vacated provided the successor had occupied the premises as a primary residence from inception of the tenancy or beginning of the relationship and in the event of death or the prime tenant, the successor family member must have occupied two years prior to the death in order to receive a renewal lease; that if the prime tenant was a senior citizen or disabled then the two year period was decreased to one year.

Plaintiffs allege that DHCR had no legislative basis for making the amendments and these were an improper exercise of the administrative power of the agency, beyond the scope of its legislative mandate. Also the amendment allegedly undermines Real Property Law §§ 235-f and 226-b denying the landlord the opportunity to reasonably consent or reject the subletting. The amendment allegedly creates marital relationship which violates the Domestic Relations law and is contrary to the Omnibus Housing Act of 1983

(Laws of 1983, chp. 403). The rules were allegedly not promulgated in accordance with the State Administrative Procedures Act (SAPA), DHCR having failed to conduct a study to determine whether an emergency existed before enactment of the emergency rules.

Plaintiffs' verified supplemental complaint includes eight causes of action and differs from the original complaint (the original was concerned with the emergency rules), and the latter substitutes and/or adds the permanent amendments in the causes of action. In the first cause of action plaintiffs allege that a justiciable controversy exists and DHCR violated the Omnibus Housing Act of 1983 by diminishing plaintiff RSA's members and co-plaintiff's rights and acting without power. A declaration is sought to that effect.

The second cause of action is that the rules and amendments undermine and contravene the Real Property Law § 235-f; the third Real Property Law § 226-b; the fourth is for a declaration that defendant knowingly and intentionally violated New York law and the rules and amendments are ultra vires and void; the fifth cause of action is that the rules and amendment contravene the Domestic Relations Law and are void; the sixth, that the rules and amendments were not promulgated in accordance with SAPA; the seventh is for a declaration that the rules and amendment constitute a violation of due process under the Fifth and Fourteenth Amendments of the United States Constitution and Article 1 §§ 6 and 7 of the New York State Constitution as an unconstitutional taking since plaintiffs may not regain their property but must enter into tenant relationships with persons with whom they are not in privity; the eighth cause of action is that the promulgation

and implementation are unconstitutional since it was a taking without just compensation to plaintiffs' members.

DHCR sets forth in its answer various affirmative defenses, including lack of standing of plaintiffs to challenge the amendment outside New York City or under Rent Control (New York Rent and Evictions) Regulations; that Plaintiffs may not in New York City challenge regulations effective outside New York City; that there is no justiciable controversy and if there is, plaintiffs are not entitled to a declaration in their favor because of an Appellate Division decision of December 4, 1990 (___ A.D. 2d ___, 562 N.Y.S. 2d 962) in which plaintiffs' arguments were rejected; that plaintiffs' sixth cause of action fails to allege specifics regarding non-compliance with SAPA. DHCR alleges that the promulgation of the Regulations was within its power, not arbitrary and capricious, in violation of law or abuse of discretion. Defendant-intervenors allege in their answers affirmative defenses that plaintiffs fail to exhaust their administrative remedies, failure to state a cause of action, lack of standing, waiver of the SAPA claims.

After DHCR had promulgated the Emergency Rules on November 8, 1989 implementing **Braschi**, RSA and the other plaintiffs instituted this action, November 13, 1989, in Supreme Court, Albany County where a TRO as to the emergency rules was obtained by them. The action was moved to New York County upon DHCR's motion. Permanent amendments identical to the emergency rules were promulgated on March 20, 1990. On April 5, 1990, the plaintiffs moved by order to show cause in IAS Part 35 to hold DHCR in contempt and to extend the TRO to the permanent amendments. This court extended the TRO and on May 15, 1990 after appeal by DHCR, the Appellate

Division First Department sua sponte deemed the TRO to be a preliminary injunction against the emergency rules and the permanent injunction. On December 4, 1990, the Appellate Decision reversed the IAS (164 A.D. 2d 283), vacating the "preliminary injunction" and dismissing the contempt appeal as moot. The Appellate Division in the December 4, 1990 determination in its discussion of likelihood of success on the merits -- a prerequisite to a preliminary injunction -- disposed of each of plaintiffs' contentions, finding that they did not have a meritorious case regarding Real Property Law § 226-b, the Domestic Relations law, the constitutional arguments, etc. Further, the court stated that the definition of family set forth in **Braschi** had been extended to apply in Rent Stabilization contexts by virtue of **East 10th St. Assoc. v. Estate of Stuart Goldstein** (154 A.D. 2d 142). That case involved Robert Wells, also a defendant-intervenor in the instant manner, who had lived in a gay-life partnership with the tenant of record in a rent stabilized apartment for a number of years when the tenant died in 1987. By the extension of **Braschi**, Wells was entitled to the protections accorded traditional family members so that the landlord's petition seeking to evict him was ultimately dismissed.

CPLR 3001 provides that the Supreme Court may render a declaratory judgment having the effect of a final judgment regarding the rights and legal relations of the parties to a justiciable controversy whether or not further relief could be claimed.

There is no doubt that there is a justiciable (actual) controversy here. Courts may not render advisory opinions but are required to determine controversies between litigants (**New York Public Interest Research Group Inc. v.**

APPENDIX D

[Decision And Final Judgment of NYS Sup. Ct. 1991]

Carey, 41 N.Y. 2d 527).

In **Doe v. Axelrod,** MD (136 A.D. 2d 410, mod. on oth. grnds 73 N.Y. 2d 748), it was determined that an action for declaratory judgment was the proper vehicle and not an Article 78 proceeding where the authority of the State Commissioner of Health to put a certain regulation into effect, where validity or a legislative act is being reviewed.

This court, after a review of the extensive papers, the Appellate Division determination, among other authorities find that plaintiffs are not entitled to summary judgment in their favor. Among other things, no actual SAPA violations have been demonstrated. At best the constitutional arguments are speculative. Declaratory judgment in their favor is denied and the court renders declaratory judgment in favor of defendants that the regulations are a proper exercise of the power of DHCR. Also plaintiffs are not aggrieved by the instant determination since persons claiming entitlement under the new regulations must make a certain showing.

Accordingly, the motion by plaintiffs is denied; the cross-motion is granted.

The foregoing constitutes the decision and judgment of the court.

s/_____

J. S. C.

Dated: November 15, 1991

Norman Goodman

Clerk

FILED: November 27, 1991

MOTION FILED
APR 19 1994

(2)

No. 93-1490

In the Supreme Court of the United States
October Term, 1993

RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., THE DELANO VILLAGE COMPANIES, RIVERDALE GARDENS, COLISEUM PARK APARTMENTS CO., and SMALL PROPERTY OWNERS OF NEW YORK,
Petitioners,

v.

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, ROBERT WELLS, EVERETT QUINTON, GAY MEN'S HEALTH CRISIS, INC., JANET GOODMAN, KAIROS RENCHER, and DISABLED IN ACTION,
Respondents.

Petition for Writ of Certiorari
to the New York State Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Petition for Writ of Certiorari to the New York State Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for petitioner and the letter of consent has been lodged with the clerk of this Court. Consent has been withheld by counsel for respondent Commissioner of the New York State Division of Housing and Community Renewal, thereby requiring the filing of this motion.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support

of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has appeared before this Court in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in the *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The present case involves a predatory regulatory scheme adopted by the New York State Division of Housing and Community Renewal (DHCR) to seize valuable property interests from petitioners and transfer them to private third parties without compensation. The opinion below upholds the validity of certain amendments to New York's Rent Stabilization Code (Succession Regulations) adopted by DHCR on April 4, 1990. The Succession Regulations redefine the term "family member" in order to extend succession rights in rent stabilized apartments to certain

occupants not previously possessing such rights. The Succession Regulations also substantially reduce the threshold for qualifying for succession rights. By intent and effect, the challenged regulations transfer a reversionary property interest from petitioners and other owners of rent stabilized apartments to a discrete class of private individuals.

The court below acquiesced in DHCR's violation of petitioners' fundamental rights by failing to apply heightened scrutiny to the challenged regulation, as required by this Court in *Nollan v. California Coastal Commission*. If allowed to stand, the opinion below will create a doctrinal conflict with this Court's careful efforts over the past two decades to extend full constitutional protection to the individual rights of property owners.

Amicus believes that review by this Court is necessary to resolve the conflicts created by the New York Court of Appeal and to reaffirm the fundamental constitutional rights of New York property owners.

DATED: April ____, 1994.

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Petition for Writ of Certiorari to the New York State Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.

STATEMENT OF THE CASE

This case involves a taking of a valuable property interest without just compensation by the New York State Division of Housing and Community Renewal (DHCR). The taking was accomplished by DHCR's adoption on April 4, 1990, of amendments to the Rent Stabilization Code governing succession rights to rent stabilized apartments (Succession Regulations).

As a side effect of New York City's long and disastrous experiment with rent control, a valuable property right has been created in tenancies in rent controlled or rent stabilized apartments. Since 1987, certain blood relatives have had rights of succession to the tenancy of rent stabilized units upon the death of the tenant of record.

By administrative fiat, DHCR's Succession Regulations redefine the term "family member" so as to vastly expand the population of individuals enjoying succession rights to rent stabilized apartments. This term was precisely defined in preexisting regulations. DHCR's redefinition could not be construed as an attempt to resolve any ambiguity or uncertainty in the Rent Stabilization Code. Rather, the

redefinition serves only to extend succession rights to a new, discrete class of private individuals.

Before the Succession Regulations were promulgated, all rent stabilized leases reflected a clearly defined assignment of property rights. Among the rights assigned by law to apartment owners was the right, under specified circumstances, to reoccupy rent stabilized apartments when the lessor of record failed to renew a lease. By redefining the term, "family member," DHCR has effectively reassigned this reversionary interest from petitioners and other owners to an extensive group of private third parties.

The New York trial court declared the Succession Regulations a valid exercise of DHCR's administrative power. Both the state appellate court and the court below affirmed, holding that no regulatory taking had occurred. In reaching this conclusion, the opinion below seriously misstates and misapplies this Court's regulatory takings doctrine.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with this Court's carefully enunciated doctrine of regulatory takings. If allowed to stand, property owners in New York will be confronted with a double standard in the protection of their rights under the

United States Constitution. Regulations that would clearly be struck down as unconstitutional under the precedent set by this Court in *Nollan* and *Lucas* will be upheld and enforced in New York state courts under the decision below.

The regulation upheld in this case by the New York Court of Appeals fails to substantially advance legitimate state interests, deprives owners of economically viable use of their property, and forces a small and powerless minority to bear the full costs of what should rightfully be a general public burden. The doctrinal conflict created by the opinion below therefore extends to every branch of this Court's regulatory takings jurisprudence.

ARGUMENT

I

THE SUCCESSION REGULATIONS UNFAIRLY SINGLE OUT RENTAL PROPERTY OWNERS TO BEAR WHAT SHOULD RIGHTFULLY BE A GENERAL PUBLIC BURDEN

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This prohibition applies against the states via the Fourteenth Amendment. *Chicago,*

Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897).

The doctrine of regulatory takings fashioned by this Court is at its core an equitable inquiry. This is reflected in the oft-quoted statement that the central purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

The strong equitable element of takings jurisprudence reaches back to the nineteenth century, when the purpose of the Takings Clause was seen as "prevent[ing] the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). More recently, the primary issue in regulatory takings cases has been viewed as a question of when "justice and fairness" demand that burdens not "remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

In *Nollan*, a state agency conditioned a building permit on the conveyance of an easement over the owners' property.

This condition was part of a systematic state program to acquire private beachfront property without paying for it. This Court conceded that the state's acquisition plan might be "a good idea"--*i.e.*, might confer a general public benefit--but nevertheless held that coastal property owners alone could not be singled out to bear the full costs of the program. *Nollan*, 483 U.S. at 692.

The question of unfairly disproportionate impact is the essence of the case at bar. The Succession Regulations identify a discrete population of apartment dwellers as deserving special privileges under the law and award them a valuable property interest in rent stabilized apartments. This property interest is simply seized from petitioners and other rightful owners and transferred to the beneficiaries without compensation. Thus, DHCR advances what it sees as the public welfare at no cost to the City of New York by forcing a small group of property owners to bear the full cost of its largess.

The Succession Regulations have been defended on the grounds that they may benefit the poor, the elderly, and the disabled. In fact, DHCR has made no effort to disqualify the young, the rich, and the able bodied from the benefits of its wealth transfer. More important, however, the relative moral or political merits of the beneficiaries of the

Succession Regulations are not properly at issue. As Justice Holmes remarked over 70 years ago, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

As Justice Scalia has commented, "[t]he fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by the public, into mere 'economic regulation,' which can disproportionately burden particular individuals." *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part).

Permitting DHCR to accomplish its public welfare objectives by seizing an uncompensated property interest from petitioners would be a classic example of forcing some persons alone to bear a disproportionate share of a public burden which, in all fairness and justice, should be borne by the public as a whole. The problems addressed by the Succession Regulations were not caused by petitioners or other property owners. The plight of the poor, the elderly, and the disabled afflicts society at large, and it is a violation of fundamental concepts of equity to shift the burden of

dealing with those problems onto a small and politically powerless group of individuals.

II

BY TRANSFERRING PETITIONERS' REVERSIONARY INTEREST TO THIRD PARTIES, THE SUCCESSION REGULATIONS FAIL TO SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS WITHIN THE MEANING OF THIS COURT'S REGULATORY TAKINGS DOCTRINE

The doctrine of regulatory takings originated 72 years ago with Justice Holmes' famous nostrum, "if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415. Over the ensuing decades courts have struggled to define how far property regulations can go before they go "too far."

Two situations have been identified in which regulations will effect *categorical* or *per se* takings. In these cases--when regulations authorize a physical invasion of private property or deprive an owner of economically beneficial use--there is a violation of the Takings Clause without regard to the public purpose advanced by the measures. *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798, 812 (1992). When the line is less clear, courts must apply heightened scrutiny to determine whether a challenged regulation fails to "substantially advance legitimate state interests." *Nollan*,

483 U.S. at 834 (citing *Agins v. City of Tiburon*, 447 U.S. 225, 260 (1980).

It is obvious that, in a trivial sense, any mechanism that reliably transfers private property to persons or causes favored by the Legislature can be said to "substantially advance" governmental interests. The court below engaged in this sort of semantic game by holding that the Succession Regulations substantially advance the legitimate goal of preventing evictions. *Rent Stabilization Association v. Higgins*, ___ N.Y. 2d ___ (1993), slip op. at 17-18. This is no more than to say that the attempted confiscation of petitioners' property was successful.

Such a finding has no bearing on the "substantial advancement" test enunciated by this Court in *Nollan*. Under *Nollan*, reviewing courts must identify a close causal relationship between a challenged property regulation and the mitigation of some public harm ***that would otherwise be caused by the owner's use of the property***. *Nollan*, 483 U.S. at 837. In the case at bar, the question is not whether the Succession Regulations advance their intended purposes, but whether there is a *close causal nexus* between petitioners' use of their property and the problems the Succession Regulations seek to ameliorate.

When DHCR adopted the Succession Regulations, it cited the public purposes of combating AIDS, poverty, homelessness, and the housing shortage. It is obvious that the Succession Regulations cannot rationally be expected to help ease New York's housing shortage. Indeed, the regulations will actually exacerbate the housing shortage by encouraging single individuals to remain in possession of apartments that in all cases are large enough to house two or more. By the same token, if the Succession Regulations have any net impact on homelessness--none has been demonstrated by DHCR--they can only be expected to ***increase*** the number of homeless by reducing the average occupancy ratio in rent stabilized apartments.

The task before this Court, then, is to determine whether the social problems of AIDS and poverty bear any close causal relationship to petitioners' use of their property. DHCR has never asserted such a causal nexus, and the court below failed to discover one. Yet absent such a nexus, *Nollan* teaches that DHCR's seizure of petitioners' reversionary rights is no more than an "out-and-out plan of extortion" that must be struck down under the Takings Clause. *Nollan*, 483 U.S. at 837.

Nollan requires DHCR to demonstrate a substantial causal relationship between petitioners' rightful enjoyment of

their property rights and the social ills sought to be remedied by the Succession Regulations. It is not up to the courts to imagine such a nexus, and it is not up to petitioners to prove its absence. DHCR has plainly failed to carry its burden of showing any causal relationship between petitioners' property and the problems of AIDS, poverty, or homelessness. Neither has DHCR shown that the challenged amendments would in any way help relieve New York's housing emergency.

By failing to apply any meaningful scrutiny to the legitimacy of the Succession Regulations, the court below reverted to the "minimal rationality" standard of review which this Court has unequivocally rejected for regulatory takings cases. The Succession Regulations abuse New York's authority to regulate the landlord-tenant relationship by employing the Rent Stabilization Code to implement general social welfare policies. This constitutes a manifest failure to substantially advance legitimate state interests as required by this Court in *Nollan*.

III

BY TRANSFERRING PETITIONERS' REVERSIONARY INTEREST TO THIRD PARTIES THE SUCCESSION REGULATIONS DEPRIVE PETITIONERS OF ECONOMICALLY VIABLE USE OF THEIR PROPERTY

When a property regulation fails to substantially advance legitimate state interests, the challenged measure must be struck down under the Takings Clause without further inquiry. However, when the Court does find the substantial nexus required by *Nollan*, the second prong of this Court's regulatory takings doctrine comes into play. Under this line of analysis, a regulation effects a taking if it deprives an owner of economically viable use of property. *Nollan*, 483 U.S. at 834; *Lucas v. South Carolina Coastal Council*, 120 L. E. 2d at 812. If any discrete element of an owner's "bundle" of property rights is extinguished, there has been a regulatory taking under this test. *Hodel v. Irving*, 481 U.S. 704, 715-16 (1987).

In the case at bar, the property interest in question is the reversionary interest in petitioners' rent stabilized apartments. By transferring the reversionary interest in these apartments to third parties, the Succession Regulations completely deprive petitioners of economically viable use (or indeed, any use at all) of these valuable property rights.

The court below avoided striking down the Succession Regulations by asserting that petitioners have not suffered a 100% loss of their reversionary interest. However, as this Court stated in *Lucas v. South Carolina Coastal Council*, ***total*** deprivation of economically viable use is not necessary to effect a taking under this test. *Lucas*, 120 L. Ed. 2d at 815 n.8. Here, there can be no dispute that petitioners' reversionary interest has been subordinated--at the stroke of DHCR's pen--to the claims of an entire class of third parties. Contrary to the holding below, a loss of this magnitude qualifies as deprivation of economically viable use as that terminology has been employed by this Court.

Moreover, the Succession Regulations cannot be saved by claiming that the statutory tenancies they create are not permanent, being limited by the lifetime of the succeeding family members. Even temporary deprivations of protected property interests violate the Takings Clause unless just compensation is paid. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987). Thus, even if it could be shown that DHCR's taking of petitioners' reversionary interest is temporary (and therefore does not completely extinguish those interests), it is an impermissible violation of petitioners' rights under the Takings Clause.

CONCLUSION

In upholding the validity of the Succession Regulations, the New York State Court of Appeals has created a conflict with every element of this Court's regulatory takings jurisprudence. The Succession Regulations were held not to violate the Takings Clause despite the fact that they fail to substantially advance legitimate state interests, deprive owners of economically viable use of their property, and force a small and powerless minority to bear the full costs of what should rightfully be a general public burden. This conclusion reflected the New York court's refusal to subject the Succession Regulations to heightened scrutiny, as required by this Court in *Nollan*.

To resolve these conflicts and to reaffirm the fundamental constitutional rights of New York property owners, Pacific Legal Foundation respectfully submits that this Court should grant the petition for writ of certiorari.

DATED: April, 1994.

Respectfully submitted,

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No. 93-1490

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Petitioners,

against

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Respondents.

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No. 93 - 1490

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., THE DELANO VILLAGE COMPANIES, RIVERDALE GARDENS AND COLISEUM PARK APARTMENTS CO., and SMALL PROPERTY OWNERS OF NEW YORK,

Petitioners,

-against-

RICHARD L. HIGGINS, Commissioner of the NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, ROBERT WELLS, EVERETT QUINTON, GAY MEN'S HEALTH CRISIS, INC., JANET GOODMAN, KAIROS RENCHER and DISABLED IN ACTION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

Certiorari should be denied as the questions raised lack sufficient constitutional dimension to warrant review.

STATEMENT OF THE CASE

A. SUCCESSION UNDER NEW YORK'S RENT LAWS

This is a facial takings challenge by owners of residential rental properties to regulations governing evictions under New York State's rent regulatory laws. The regulations apply where the tenant of record vacates a regulated apartment leaving members of the household behind. They prevent the eviction of those remaining who have a substantial connection to the apartment and a close relationship with the tenant, although they may not be related in the traditional sense as by blood, marriage or adoption.[1]

New York's rent regulatory system consists of two types of laws: rent control and rent stabilization.[2] The New

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[1] The amendments modified the State Rent and Eviction Regulations, 9 NYCRR 2100 to 2109 (rent control outside New York City), the Rent and Eviction Regulations for the City of New York, 9 NYCRR 2200 to 2210 (rent control within New York City), the Emergency Tenant Protection Regulations, 9 NYCRR 2500 to 2510 (rent stabilization outside New York City), and the Rent Stabilization Code, 9 NYCRR 2520 to 2530 (rent stabilization within New York City).

[2] Rent control and rent stabilization are both administered by DHCR pursuant to the Omnibus Housing Act of 1983. 1983 N.Y. Laws 403. DHCR is also responsible for the promulgation of regulations implementing the statutory protections. The complete text of the rent regulatory laws and the regulations promulgated thereunder may be found at N.Y. Unconsolidated Laws, McKinney's Book 65 §§ 8581-8700 (1987 and Supp).

York City Rent Control Law applies generally to units constructed prior to February 1, 1947, which have not become decontrolled by reason of a vacancy occurring after June 30, 1971. N.Y.C. Admin. Code, Sections 26-401, et seq. (McKinney's Unconsol. Laws). The Rent Stabilization Law applies generally to buildings containing six or more units constructed between February 1, 1947 and January 1, 1974, and to units which were previously subject to the Rent Control Law but were decontrolled upon vacancy. N.Y.C. Admin. Code, Sections 26-501, et seq. (McKinney's Unconsol. Laws) In general, buildings constructed after January 1, 1974 are not subject to any form of rent regulation.[3]

Both systems have mechanisms for regularly determining reasonable rent increases to enable owners to cover rising costs of maintaining their buildings and to afford them a reasonable return on their investment.[4] Both systems also allow the withdrawal of units from the rental market under a variety of circumstances, such as for owner occupancy, business use, demolition, and cooperative or condominium conversion.[5] They also provide remedies for rent increases

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[3] Both systems were established pursuant to State enabling legislation; the State Emergency Housing Rent Control Law, McKinney's Unconsol. Laws, §§ 8581-8597; and the Local Emergency Housing Rent Control Act, McKinney's Unconsol. Laws, §§ 8601-8617. There are also two parallel systems of rent regulation for areas of New York State outside of New York City. In general, the same principles apply to the systems inside and outside New York City.

[4] As to rent stabilization, *see* N.Y.C. Admin. Code § 26-510 (b). As to rent control, *see* N.Y.C. Admin. Code § 26-405.

[5] As to evictions for owner occupancy, *see* 9 NYCRR 2524.4(a) and 9 NYCRR 2204.5; as to evictions for purposes of withdrawing

(continued...)

based on hardship.[6]

Succession has always been an essential element of New York's rent regulatory scheme. This is because the goal of protecting the state's citizenry from dislocation cannot be accomplished by solely preserving the leasehold interests of the named tenant. Where the named tenant vacates and leaves behind members of the household who would suffer equally from dislocation, additional measures are needed to protect their home.

Under rent control, succession rights were long based on a broad regulatory definition of "tenant" which included persons "entitled to the possession, use or occupancy", 9 NYCRR 2200.2(o), or specific provisions permitting succession for members of the tenant's "family who ha[ve] been living with the tenant". 9 NYCRR 2204.6(d). The essential test was whether the occupant had a sufficiently close relationship with the named tenant and a substantial connection to the apartment. In *Braschi v. Stahl*, 74 N.Y.2d 201, 544 N.Y.S.2d 784 (1989), the New York Court of Appeals ruled that the term family in the rent control regulations should not be restricted to persons related by blood, marriage or adoption, but should extend to individuals whose relationship with the former tenant bore the characteristics of emotional and financial commitment and interdependence which are typical of family relationships.

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[5](...continued)
from rental market, *see* 9 NYCRR 2524.5 (a)(1) and 9 NYCRR 2204.9; as to evictions for purposes of demolition, *see* 9 NYCRR 2524.5(a)(2) and 9 NYCRR 2204.8.

[6] As to rent stabilization, *see* 9 NYCRR 2522.4 (b) and (c). As to rent control, *see* 9 NYCRR 2202.7 and 9 NYCRR 2202.8.

Following *Braschi*, the Division implemented its principles by promulgating the challenged regulations. The regulations amended the regulations for both rent control and rent stabilization.[7] The regulations serve to protect from eviction individuals whose relationship with the former tenant was characterized by the specified indicia of emotional and financial commitment and interdependence, including senior citizens living together on fixed incomes, combined single parent households, permanent relationships for care of a minor or disabled person, as well as gay and unmarried heterosexual couples.

Those who claim succession rights must show both a qualifying relationship and a minimum period of co-residency. They must show a relationship of "emotional and financial commitment and interdependence" based on factors such as longevity of relationship, intermingling of financial assets and obligations, sharing of household expenses and responsibilities, joint social and family activities and mutual arrangements for family care and provision of necessities. They must also show that they have lived in the apartment as their primary residence since the inception of the tenancy or commencement of the relationship with the tenant, or for a period of two years, or one year for senior citizens and disabled persons.

The numerous cases reported since the regulations were adopted show that the co-residency requirements effectively screen out persons who have an insufficient connection to the

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[7] Before the amendment, the Rent Stabilization Code, Sections 2523.5(b)(1) and 2520.6(o), afforded succession rights to spouses, children, parents, siblings, stepparents, stepchildren, grandparents, grandchildren, mothers-in-law, fathers-in-law, daughters-in-law, sons-in-law, uncles, aunts, nieces and nephews.

premises.[8] Reported cases also show that claims are often denied for lack of indicia of significant personal, financial and legal commitment,[9] and are only accepted where the standards

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[8] *Gottlieb v. Licursi*, 191 A.D.2d 256, 595 N.Y.S.2d 17 (1st Dept. 1993); *Quiala v. Laufer*, 180 A.D.2d 31, 584 N.Y.S.2d 786 (1st Dept. 1992); *Greenberg v. Coronet Properties Co.*, 167 A.D.2d 291, 562 N.Y.S.2d 33 (1st Dept. 1990); *Global Mgt. v. Engracia*, N.Y.L.J. Feb. 21, 1991, p. 27, col. 6 (App. Term, 2nd and 11th Jud. Dist.); *Wonko Realty Corp. v. Estate of Mary Dreisch*, 150 Misc.2d 1046, 572 N.Y.S.2d 276 (Civ. Ct., N.Y. Co., Scott, J.); *Connelly v. Martin*, N.Y.L.J., Feb. 20, 1992, p. 22, cols. 5-6 (App. Term, 1st Dept.); *New York University v. Filliatre*, N.Y.L.J., Jan. 22, 1991, p. 24, col. 5, (App. Term, 1st Dept.); *Haroust Corp. v. Chin*, N.Y.L.J., Apr. 22, 1993, p. 23, cols. 3-4 (App. Term, 1st Dept.); *Liant Record Co. v. Newman*, N.Y.L.J., June 7, 1993, p. 29, cols. 1-2 (App. Term, 1st Dept.); *Lincoln Terrace Associates v. Sorrentino*, N.Y.L.J., June 10, 1993, p. 25, col. 6, p. 26, col. 1 (App. Term, 1st Dept.); *Parcel 242 Co. v. Heitner*, N.Y.L.J., Aug. 29, 1990, p. 21, cols. 5-6, p. 22, cols. 2-3 (Civ. Ct., N.Y. Co., Wendt, J.); *LF One Company, Inc. v. Bobrowski*, N.Y.L.J., Dec. 28, 1990, p. 21, cols. 3-4 (App. Term, 1st Dept.); *IDF Limited Partnership v. Leahy*, N.Y.L.J., Aug. 4, 1992, p. 21, cols. 4-5 (App. Term, 1st Dept.).

[9] *GSL Enterprises, Inc. v. Goldstein*, N.Y.L.J., July 13, 1993, p. 22, cols. 2-3 (App. Term, 1st Dept.)(the tenant's girlfriend, who had lived in the apartment as a primary resident for two and one half years, nevertheless failed to meet the standards of the regulations for a qualifying relationship); *Ramirez v. Lopez*, N.Y.L.J., Nov. 14, 1991, p. 22, cols. 3-4 (App. Term, 1st Dept.); *Seminole Realty Co. v. Greenbaum*, N.Y.L.J., Apr. 8, 1993, p. 23, col. 4 (App. Term, 1st Dept.); *Allerton Associates v. Shannon*, N.Y.L.J., Feb. 26, 1993, p. 21, col. 6, p. 26, col. 6, p. 27, cols. 1-2 (Civ. Ct., Bronx Co., Fiorella, J.); *Park Holding Co. v. Power*, N.Y.L.J., Jan. 17, 1992, p. 26, col. 1 (App. Term, 1st Dept.).

are amply met.[10]

B. PROCEEDINGS BELOW

The Division first promulgated the regulations pursuant to New York State's emergency rule-making procedures on November 9, 1989. Such procedures allow regulations to be implemented on a temporary basis pending the promulgation of permanent regulations following periods for public notice and comment. On November 13, 1989, petitioners obtained an order from the New York Supreme Court preliminarily staying implementation of the emergency regulations. In support of their application for a stay, petitioners argued that the regulations were contrary to various state statutes, were adopted in excess of the Division's statutory authority, and effected an unconstitutional taking of property without just compensation.

While the litigation was pending, the Division proceeded with the process required to promulgate the regulations on a permanent basis. The regulations were published in the State Register and became effective on April 4, 1990. Petitioners then obtained an order from the New York Supreme Court extending the previous stay to the permanent regulations.

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[10] *Strassman v. Estate of Daniel Eggena*, 151 Misc.2d 638, 582 N.Y.S.2d 899 (App. Term, 1st Dept. 1992); *Lerad Realty Co. v. Reynolds*, N.Y.L.J., Aug. 29, 1990, p. 22, cols. 5-6, p. 23, col. 1 (Civ. Ct., N.Y. Co., Kramer, J.); *43-45 W. 129th St. HDPC v. John & Jane Doe*, N.Y.L.J., Mar. 2, 1992, p. 25, col. 6, p. 31, cols. 2-4 (Civ. Ct., N.Y. Co., Gans, J.); *Seminole Hous. Corp. v. Leone*, N.Y.L.J., May 24, 1990, p. 27, cols. 3-4, (App. Term, 2nd and 11th Jud. Dists.).

The Division then filed a notice of appeal which, under New York law, automatically stayed the order of the Supreme Court pending prosecution of the appeal. Upon prosecution of the appeal, the Appellate Division of the Supreme Court issued a unanimous order vacating the injunction. The opinion of the court considered all of the petitioners' arguments against the validity of the regulations and found them to be without merit. *Rent Stabilization Association v. Higgins*, 164 A.D.2d 283, 562 N.Y.S.2d 962 (1st Dept. 1990). With respect to petitioners' constitutional arguments, the court noted that the physical taking argument lacked merit because the regulations did not fundamentally change the nature of the rent regulatory system as to authorize permanent occupation of the sort which traditionally has been held a taking, but rather were similar in nature to regulations which had long been upheld involving restrictions upon existing tenancies where landlords had voluntarily put their properties to use for residential housing. 562 N.Y.S.2d at 970. The court also rejected the petitioners' regulatory takings argument noting that the petitioners had not shown that the regulations prevented owners from obtaining a reasonable return on their property, and also noting that the regulations substantially advanced the legitimate state interest of preventing the eviction of individuals with substantial ties to the apartment and to the former tenant of record. 562 N.Y.S.2d at 971.

Following the opinion of the Appellate Division, the parties returned to New York Supreme Court seeking summary judgment in their favor. In granting the Division's summary judgment motion, the court noted in relevant part that petitioners' constitutional arguments were, at best, speculative. Petitioners then appealed once again to the Appellate Division which affirmed the judgment. In its decision, the Appellate Division reconsidered the takings issue, reviewed the most recent decisions from this Court, and adhered to its prior conclusion that the regulations were valid. *Rent Stabilization*

Association v. Higgins, 189 A.D.2d 594, 592 N.Y.S.2d 255 (1st Dept. 1993).

Upon petitioners' appeal, the New York Court of Appeals also upheld the regulations. In the course of its opinion, the court rejected petitioners' claim that the regulations were unconstitutional on their face. The Court of Appeals rejected the petitioners' physical taking argument noting, among other things, that the regulations did not affect the owners' right to convert rent-regulated properties to other uses, did not compel owners to subject their property to unintended uses, and were similar in nature to laws upheld by this Court eliminating an owner's unfettered discretion to reject particular tenants. *Rent Stabilization Association v. Higgins*, __ N.Y.2d __, 608 N.Y.S.2d 930, 936-7. The court also rejected petitioners' argument that the regulations effected a regulatory taking on their face noting, among other things, that the regulations did not affect the owners' right to receive the regulated rents, unchallenged as a reasonable return, and that the regulations substantially advanced the legitimate governmental objective of preventing unwarranted evictions and alleviating homelessness. 608 N.Y.S.2d 637-8.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

Petitioners admit that this is a facial challenge, Pet. for Cert. 22; it does not involve any particular case in which the regulations were applied. Yet, the questions presented by petitioners fall far short of the standards for mounting a facial attack, which requires a showing that *no* set of circumstances exist under which the regulations would be valid, *Reno v. Flores*, 507 U.S. __, 113 S.Ct. 1439, 1446, 123 L.Ed.2d 1, 16 (1993), and do not merit the granting of certiorari. In fact, the Court has recently reviewed and rejected challenges to enactments similar to those in the case at bar. Review of petitioners' questions would therefore do little, if anything, to further jurisprudence in this area.

Petitioners' first claim is that the regulations do not substantially advance a legitimate state interest as required by *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677 (1987). However, this claim is based on a gross distortion of the ends sought to be accomplished by the regulations.

Petitioners would have the Court believe that the purpose of the regulations is to resolve a low vacancy rate, homelessness, poverty, and the AIDS crisis, and argue that the regulations are not sufficiently tied to those concerns. However, the record is clear that their purpose was not so limited. The purpose of the regulations was to address the overarching problem of preventing unwarranted evictions. The official filings of the Division pursuant to the State's Administrative Procedure Act read as follows with respect to the amendments to the Rent Stabilization Code:

8. *Purpose of the emergency rule*:

To clarify and assure the lease renewal succes-

> sion rights of a rent stabilized tenant's qualified family member, including a non-traditional family member who resides with the tenant in the housing accommodation as a primary resident, when the tenant permanently vacates the housing accommodation.

In official filings responding to public comments that the regulations constituted a taking without just compensation, the Division also made clear that the purpose of the challenged regulations was the prevention of unwarranted evictions. In relevant part, the Division responded that: "[t]he regulations clearly advance legitimate public interests in preventing unwarranted evictions and displacement of residents already in place..."

While the Division did indeed refer to the low vacancy rate, homelessness, poverty, and the AIDS crisis, such references were not made to suggest that the regulations were intended to solve these problems. Rather, they were cited as examples of conditions which emphasized the need for extending protection from eviction in order to prevent additional displacement and dislocation. That petitioners are forced to misstate the purpose of the regulations in order to argue that they do not substantially advance their purpose only serves to confirm that petitioners cannot present a real facial challenge based on the nexus between the regulations and their intended purpose.

There can be no doubt that a close nexus exists between the regulations and their intended purpose. The regulations do more than "substantially advance" their purpose of preventing unwarranted evictions; they do so in a direct and immediate manner by protecting residents of rent-regulated apartments from being thrown out of their home upon the death or departure of the tenant. Petitioners argue that the Court of

Appeals did not apply the "heightened scrutiny" test in reviewing the regulations, but instead paid lip service to it by engaging in a cursory, one sentence examination of the nexus between the regulations and their stated purpose. Pet. for Cert. 17. However, the nexus is so patently obvious that no further analysis is warranted. As the court stated: "People who would, absent the regulations, be threatened with eviction from their homes may now have the right to remain." There is no need for the Court to review this entirely sensible analysis.

Petitioners' second claim is that the regulations place burdens upon owners that should be borne by society as a whole. However, this claim also does not merit review as the Court has repeatedly noted that "'states have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.'" *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6, 99 L.Ed.2d 1 (1988) [quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)]. And in its most recent takings decision in *Concrete Pipe and Products of California, Inc., v. Construction Laborers Pension Trust for Southern California*, __ U.S. __, 113 S.Ct. 2264, 2291, 124 L.Ed.2d 539, 579 (1993), this Court once again emphasized that "mere diminution in value of property, however serious, is insufficient to demonstrate a taking."

Through the years, federal, state and local governments have, in response to significant housing shortages, enacted legislation declaring the existence of a serious public emergency and restricting the ability of landlords to raise rents and evict tenants. This Court, as well as others, has consistently rejected constitutional challenges to such restrictions. *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Loab Estates,*

Inc. v. Druhe, 300 N.Y. 176, 180 (1949); *Fresh Pond Shopping Center, Inc., v. Callahan*, 464 U.S. 875 (1983); *Troy v. Renna*, 727 F.2d 287 (3rd Cir. 1984); *Nash v. City of Santa Monica*, 688 P.2d 894 (Cal. Sup. Ct. 1984), *appeal dism. for want of federal question*, 470 U.S. 1046 (1985). There is nothing in petitioners' papers that warrants revisiting these precedents.

In this context, petitioners also assert that this case presents an opportunity for this Court to resolve issues of tenant hardship and landlord property rights which were left unresolved in *Pennell*. However, this claim is imaginary at best. The issue *Pennell* left unresolved as premature was the constitutionality of an ordinance which permitted the reduction of the rent below an objectively reasonable level based on tenant hardship. 485 U.S. at 9-10. This issue is not remotely present herein for the regulations on their face do not prevent owners from earning a reasonable return.[11] Accordingly, and especially given the facial nature of petitioners' challenge, the second takings claim raised by petitioners does not warrant granting of certiorari.[12]

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[11] In fact, even the dissenting opinion in *Pennell* agreed that (apart from the single feature under attack in *Pennell*) where a housing shortage enables owners to charge excessive rents and reap unique benefits from the situation that produces economic hardship, singling them out to relieve it may not be regarded as unfair. *Pennell*, 485 U.S. at 20 (Scalia, J.).

[12] It should be noted that to the extent that petitioners' arguments might be read to suggest that some owners may be prevented from earning a reasonable return as a result of the regulations, such a claim does not meet the standards required to mount a facial attack, as facial challenges cannot be based on the extent to which the regulations might affect some, but not all, owners. *Yee v. City of Escondido*, 503 U.S.

(continued...)

Petitioners' third claim is that the regulations reduce the owners' reversionary interest by restricting their ability to evict qualified family members upon the departure of the tenant of record. However, this Court has made it clear that takings jurisprudence focuses on the nature of the owner's property rights as a whole, not on each discrete segment or strand, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 94 L.Ed.2d 472, 496 (1987), and owners are still likely to profit from their business venture despite the possibility of a reduction of their reversionary interest. As a whole, owners are engaged in the business of renting regulated real estate, not emptying buildings. Thus, as a rule, the only benefit they receive is a limited rent increase that may be charged to a tenant following a vacancy. The possible loss of this benefit is minimal, generally amounting to less than .045% of a building's rent roll (Record on Appeal Below 659), and does not raise constitutional concerns.

In the recent decision in *Concrete Pipe*, the Court reaffirmed the principle that property could not be divided into separate portions in order to establish a taking. __ U.S. at __,

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[12](...continued)
__, 112 S.Ct. 1522, 1532, 118 L.Ed.2d 153, 169 (1992). Furthermore, such an attack requires the participation as a party of each individual owner who claims to be adversely affected and must be based on "dollars and cents" proof rather than broad platitudes and theoretical predictions. *Rent Stabilization Association of New York v. Dinkins*, 5 F.3d 591, 596-597 (2d Cir. 1993). Moreover, such takings claims are premature unless the challengers have pursued available remedies for deriving economic benefit from their property. *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 87 L.Ed.2d 126 (1985); *Hodel v. Virginia Surface Mining & Reclamation Assn*, 452 U.S. 264, 69 L.Ed.2d 1 (1981). Under the rent laws, individual owners may well be entitled to seek rent increases based on hardship.

113 S.Ct. at 2290, 124 L.Ed.2d at 577-578. Moreover, the Court has made it clear that loss of future profits, at least in the absence of an interference with an owner's legal right to dispose of his land, does not constitute a taking. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 15, 81 L.Ed.2d 1, 14 (1984); *Andrus v. Allard*, 444 U.S. 51, 66, 62 L.Ed.2d 210, 223 (1979). Accordingly, in light of these precedents, petitioners' third takings claim also lacks sufficient constitutional dimension to warrant that certiorari be granted.

Lastly, petitioners raise the claim that the challenged regulations effect a physical taking. However, in *Yee*, 503 U.S. at __, 112 S.Ct. at 1522, 118 L.Ed.2d at 153, this Court held that there was no physical taking in a case involving greater interference with property interests of owners than the restrictions imposed by the instant regulations. The Court reasoned that government effects a physical taking only where it requires owners to submit to the occupation or invasion of their property, and that where owners voluntarily place their property on the rental market, government may limit rents and require landlords to accept complete strangers as tenants without automatically having to pay compensation. 503 U.S. at __, 118 L.Ed.2d at 172.

As in *Yee*, the challenged regulations do not require owners to place their property on the rental market. Moreover, the regulations are more favorable to owners than those in *Yee*, as they do not require owners to accept complete strangers as tenants but simply protect from eviction members of a tenant's household who have resided at the premises for significant periods of time and who can establish the requisite emotional and financial commitment and interdependence with the tenant through rigorous and objective criteria.

Petitioners would distinguish this case from *Yee* on the basis that the owners in *Yee* could unilaterally choose to go out of the rental business, while they allegedly could not do so

under New York's rent laws. However, in making this allegation, petitioners neglect to note the conditions that the owners in *Yee* were required to meet before changing the use of their property, and also fail to inform the Court as to the many grounds that owners have available to recover their properties under New York's rent laws notwithstanding the instant regulations.

Under the ordinance upheld in *Yee*, owners had to meet various conditions and secure discretionary approvals before they could in fact change the use of their land. Owners were required to give six or twelve months notice to residents and to prepare an impact report, and could be required to pay relocation benefits, or even purchase the used mobile homes at "in place value." Depending upon the new use proposed and applicable zoning, conversion could also require preparation of an environmental impact report, a change in zoning, amendments to the local general plan, and approval of a subdivision map. *Yee*, 503 U.S. at __, 118 L.Ed.2d at __; *Yee* Reply Brief for Petitioners 10, n.6. Under New York's rent laws, owners may refuse to offer renewal leases where they require premises for business purposes or, under certain circumstances, to recover possession for personal use and occupancy. Owners may also withdraw from the rental market, under certain circumstances, if they wish to demolish a building. In light of these available remedies, and given the facial nature of their challenge, petitioners' physical takings claim also fails to warrant a grant of certiorari.

The petition fails to present any important constitutional question which should have been but has not been settled by this Court. Nor does it establish any conflict with decisions of other federal or state appellate courts which require resolution by this Court.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

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No. 93-1490

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

Petitioners,

—v.—

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Whether the decision of the New York Court of Appeals correctly held that modifications to New York State's family anti-eviction regulations do not, on their face, effect a physical or regulatory taking.

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INTRODUCTION

Respondents respectfully submit that the petition for a writ of *certiorari* should be denied in this facial challenge to New York State's family anti-eviction amendments. The question presented for review is neither novel nor difficult under this Court's precedents. The decision of the New York Court of Appeals is not in conflict with decisions of this Court, nor is it at odds with holdings in any other jurisdiction. In short, there is no reason for this Court's plenary review.

STATEMENT OF THE CASE

A. History Of The Challenged Amendments

Since the 1920's, New York State has regulated the residential housing market in order to protect tenants from the harms caused by an ongoing shortage of affordable housing. As part of those schemes, known locally as Rent Control and Rent Stabilization, the State has regulated evictions, as well as rents, prohibiting the eviction of family members on the death or departure of the tenant of record during an ongoing housing shortage.[1] In July 1989, the New York State Court of Appeals held that the family anti-eviction protections codified in New York City's rent control regulations should be extended to families related other than by

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[1] Under Rent Control, co-residing family members related by blood, marriage or adoption were protected from eviction on the death or departure of the tenant. 9 N.Y.C.R.R. §2204.6(d)(McKinney Uncon. 1987). Under Rent Stabilization, an expansive list of family members were protected from eviction: husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law. 9 N.Y.C.R.R. §2520.6(o)(McKinney Uncon. 1987). Continuation of these protections is dependent on periodic legislative recertification that a housing shortage persists. *See* n.10, *infra*.

blood or marriage. The Court held that,

> [t]he intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.

Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 211 (1989). The Court also provided indicia by which to determine

> whether an individual is entitled to nonevictionprotection . . . based upon an objective examination of the relationship of the parties . . . . including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services.

Id. at 212-13 (citations omitted).

On November 8, 1989, the New York State Division of Housing and Community Renewal ("D.H.C.R.") codified *Braschi* in a series of amendments to the existing family anti-eviction regulations.[2] D.H.C.R. determined

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[2] 9 N.Y.C.R.R. §2204.6(d)(McKinney Uncon. Supp. 1993), New York City's Rent [Control] and Eviction Regulations ("Rent and Evic. Regs."); 9 N.Y.C.R.R. §§2520.6(o) and 2523.5(b)(McKinney Uncon. Supp. 1993), New York City Rent Stabilization Code ("R.S.C."); 9 N.Y.C.R.R. §2104.6(d)(McKinney Uncon. Supp. 1993), New York State Rent and Eviction Regulations (rent control outside of New York City); and 9 N.Y.C.R.R. §§2500.2(m) and 2503.5(d)(McKinney Uncon. Supp. 1993), Emergency Tenant Protection Regulations ("E.T.P.R.")(rent stabilization outside of New York City). These amendments were made immediately effective on an emergency basis pursuant to N.Y.S.A.P.A. §202(6)(McKinney Supp. 1994) in order to prevent the eviction of family members prior to the final enactment of (continued...)

that there were close family members, related by other than blood, marriage or adoption, who were not protected by the prior regulations and who faced eviction from their homes on the departure of the named tenant unless the regulations were amended. Record on Appeal below, Vol. II, pp.133, 140, 148, 155; Vol. IV, pp.1826, 1849, 1873, 1895. Further, the plight of two groups who frequently live in such families not protected under the prior regulations -- poor people and persons with AIDS -- dramatically highlighted for D.H.C.R. the need for the amendments. Record on Appeal below, Vol. II, pp.137-39, 145-47, 152-54, 159-61, 162-73. The agency noted:

> The decision in the *Braschi* case which involved a tenant who died of AIDS, underscored the reality that the definition of a family in America has changed dramatically in the 1970's and 1980's. Gay couples, de facto marriage, single parent households and many other living arrangements are no longer exceptional, especially in New York City . . . . Thus, at a minimum, about one out of every nineteen of the City's 935,373 rent stabilized households will be affected by these . . . rules, which are intended to clarify a non-traditional family member's right to remain in his or her home, particularly at a time when a significant percentage of these households are vulnerable to the AIDS epidemic.

Record on Appeal below, Vol. II, pp.138-39. *See also, e.g.*, Vol. II, pp.144-47, 152-54, 159-61, 163-64, 169-70, 172-73.

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[2] (...continued)
the permanent amendments. Record on Appeal below, Vol. II, pp. 118-73; Transcript on Appeal below, pp.105-06.

In order to protect such families from eviction, D.H.C.R. amended the definition of "family" in the relevant regulations by incorporating the objective factors set forth in *Braschi* to identify such persons. The agency also provided examples of the categories of evidence by which such families might establish their claim. Record on Appeal below, Vol. II, pp.19-32.[3] Besides the modification in the definition of family, D.H.C.R. also harmonized the required period of co-residency necessary for a family member to claim anti-eviction protection under all of the applicable regulatory schemes. Record on Appeal below, Vol. IV, p.1837. This modification provided that a family member who has lived with a tenant in an apartment for at least two years as her primary residence, one year if disabled or elderly, has made that apartment her family home, from which she should not be evicted on the departure of the tenant, irrespective of whether the tenant dies or vacates the apartment.

B. Procedural History

On November 13, 1989, five days after the amendments were promulgated, petitioners commenced this facial challenge. The complaint alleged that the amendments were promulgated *ultra vires*, that they violated a host of state statutes, and that they effected, on their face, a physical and regulatory taking. However, the complaint contained no specific allegation of any landlord's loss of income or regarding any hardship effected by the amendments, much less a claim that the amendments denied petitioners all productive or economically beneficial use of their property. Immediately following the commencement of this action, the nongovernmental respondents -- individual tenants and organizations representing disabled, elderly, poor, gay and lesbian family members -- joined the lawsuit as defendant-intervenors

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[3] *See* Pet. at 4-5 for text of amendments.

to protect their interests in the protections afforded by the modifications to the family anti-eviction regulations.

Petitioners obtained a temporary restraining order ("T.R.O.") against the emergency implementation of the challenged regulations. Record on Appeal below, Vol. II, pp.46-117, 220-59. The permanent amendments to the regulations became effective on or about March 20, 1990, pursuant to N.Y.S.A.P.A. §202(6)(b)(McKinney Supp. 1994). Record on Appeal below, Vol. IV, p.1738.[4] On April 18, 1990, the trial court extended the temporary restraining order to the permanent amendments. Transcript on Appeal below, pp.303-08; Record on Appeal below, Vol. II, p.44.

On December 4, 1990, the appellate division, deeming the temporary restraining order to be a preliminary injunction, unanimously vacated the injunction. The appellate division rejected all of petitioners' statutory claims. The court also held that the challenged amendments did not effect a forced, permanent physical invasion of property and that petitioners were unlikely to be able to demonstrate that the amendments did not substantially advance the stated purpose of the amendments. *Rent Stabilization Assoc. v. Higgins*, 164 A.D.2d 283 (1st Dep't 1990); App. C.

By an order entered November 27, 1991, the trial court, on the authority of the appellate division's decision, granted summary judgment to defendant D.H.C.R. and defendant-intervenors. App. D. On January 12, 1993, the appellate division unanimously affirmed the

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[4] Petitioners' proposed order to show cause, seeking to bring on a motion to hold D.H.C.R. in contempt for allegedly promulgating the permanent amendments in violation of the T.R.O., was denied by the trial court. Record on Appeal below, Vol. II, p.44. Petitioners' appeal of that denial was dismissed as moot by the appellate division. *Rent Stabilization Assoc. v. Higgins*, 164 A.D.2d 283, 299 (1st Dep't 1990); App. C, p.37a.

lower court's decision upholding the validity of the permanent amendments. 189 A.D. 2d 592 (1st Dep't 1993); App. B. The appellate division specifically held that, "[e]ven under the heightened scrutiny applicable to regulatory takings, the regulations substantially advance a legitimate governmental interest (*see Nollan v. California Coastal Commission*, 493 U.S. 825, 834)." App. B, p.19a.

On December 21, 1993, the New York State Court of Appeals unanimously held that the amendments do not constitute a physical or regulatory taking. 83 N.Y.2d 156 (1993), App. A. The court of appeals found that "there is a close causal nexus between the challenged regulations and the stated purpose of preventing eviction . . . ." App.A, p.14a. The court of appeals also rejected petitioners' argument that the amendments create "perpetual tenancies," holding that "[a]n owner's right to evict an unsatisfactory tenant or convert rent-regulated property to other uses remains unaffected . . . ." *Id.* at p.11a.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED SINCE THE DECISION OF THE NEW YORK STATE COURT OF APPEALS DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS OR ANY OTHER COURT

"This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulations entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 456 U.S. 419, 440 (1982); *see, e.g., Block v. Hirsh*, 256 U.S. 135 (1921)(upholding New York's rent and eviction controls because of housing shortage); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922)(same); *Bowles v. Willingham*, 321 U.S. 503 (1944)(upholding national rent controls because of hous-

ing shortage); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948)(same); *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987)(commercial rent controls); *Pennell v. City of San Jose*, 485 U.S. 1 (1988)(municipal rent controls); *Yee v. Escondito*, 503 U.S. __, 112 S.Ct. 1522 (1992)(municipal rent and eviction controls). Petitioners do not challenge in this case the constitutionality of rent regulation itself, nor the legislative findings that a continuing housing shortage exists in New York City and State. Nor do petitioners challenge the validity of the previous family anti-eviction regulations. Rather, the only claim that petitioners press is that the 1989 modification of the definition of family, on its face, constitutes an unconstitutional physical and regulatory taking. Petitioners do not claim that this modification has been applied to their property.

The challenged amendments are unexceptional regulations of the landlord-tenant relationship of the sort long upheld by this Court. This Court should refuse petitioner's request to review this settled area of rent and eviction regulation[5] since, as demonstrated below, the decision of New York State's highest court upholding the facial validity of the regulatory amendments does not conflict with applicable decisions of this or other courts.

Petitioners seek *certiorari* of the court of appeals' decision under this Court's Rule 10.1(c), arguing that the decision below conflicts primarily with the decision of this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and also with the decision in *Yee v. City of Escondito*, 112 S.Ct. 1522. Pet. at 6-7, 25-28.[6]

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[5] Indeed, this Court previously refused to review New York's family anti-eviction regulations. *Cohen v. Berger*, 153 A.D.2d 920 (1st Dep't 1989), *appeal denied*, 75 N.Y.2d 809 (1990), *cert. denied*, 499 U.S. 962 (1991).

[6] In the section of the petition entitled "Reasons for Granting the Writ," Pet. at 7, petitioners also attempt to rely on Rule 10.1(b), but (continued...)

The court of appeals' decision conflicts with neither decision. The New York Court of Appeals, adopting the nexus test set forth in *Nollan*, correctly rejected petitioner's regulatory taking claim.[7] *See* Part A, *infra*. The court also appropriately rejected petitioners' physical taking claim based on the principles enunciated in *Yee*. *See* Part B, *infra*. Therefore, petitioners are unable to meet their burden under Supreme Court Rules 10.1(b) and (c) of demonstrating that there exists "a real or 'intolerable' conflict in the same matter of law or fact" between the decision of the court of appeals and this Court's precedents or the application of those precedents by other courts. Stern, Gressman, Shapiro & Geller, *supra* n.7, at 167. Their petition should be denied.

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[6] (...continued)
in fact can point to no decision of another state court of last resort or United States court of appeals that conflicts with the court of appeals' decision. The cases relied upon by petitioners, only one of which is a rent regulation case, simply reiterate *Nollan*'s holding that a nexus must be demonstrated between the regulation and its stated purpose. Pet. at 7. In the one rent regulation case cited, *Azul Pacifico v. City of Los Angeles*, 948 F.2d 575, 583 (9th Cir. 1991), the court found that the *Nollan* nexus test was met even if only one of two proffered purposes supporting vacancy control provisions, *i.e.*, "protecting incumbent residents," was established. The court of appeals' decision in this case does not conflict with any of these decisions. Not surprisingly, then, petitioners do not press this argument as a basis for the writ in the sixteen-page argument section of the petition.

[7] Indeed, the heart of petitioners' argument is simply that the court of appeals erred in applying the *Nollan* test to the specific facts presented by the anti-eviction amendments, not that the court rejected the *Nollan* standard. Pet. at 6-7. Thus, what petitioners actually seek is a fourth level of review of their facial regulatory taking claim, which was unanimously and correctly rejected three times below. However, even if petitioners' claim of misapplication were correct, "[i]t has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 193 (7th ed. 1993), and cases cited therein; *see, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

A. The New York State Court Of Appeals' Decision Does Not Conflict With The Nexus Test Enunciated In *Nollan*

In *Nollan*, this Court held that a regulation may effect a regulatory taking if it does not "substantially advance" the state interest underlying the regulation. 483 U.S. at 834.[8] Thus, the *Nollan* Court required that there

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[8] In this facial challenge, petitioners do not base their regulatory takings challenge on a claim that the amendments on their face deny them all productive or economically beneficial use of their property. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. __, 112 S. Ct. 2886 (1992). Indeed, under the amendments the landlord continues to collect the same rent he or she would collect if the successor tenant were one permitted to succeed to the tenancy under the former regulations, which are not challenged here. In either case, the landlord's only conceivable "loss" is the maximum profit provided by a vacancy increase. App. A, p.6a. However, this Court's "cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe and Products of California v. Construction Laborers Pension Trust*, 508 U.S. __, __, 113 S.Ct. 2264, 2290 (1993). In any event, the challenged amendments do not disturb the provisions of the rent regulation schemes which guarantee a reasonable return on a landlord's property. Rent Stabilization Law ("R.S.L.") §26-510(c)(McKinney Uncon. 1987); R.S.C. §§2522.2, 2522.4(a)(1) and (4), 2522.4(a)(2), 2522.5(d)(1); Rent and Evic. Regs. §§2202.3, 2202.4, 2202.5, 2202.7, 2202.10, 2202.11, 2202.12. If a landlord's economic return is reduced below a reasonable level, regulations permit the landlord to apply for a rent increase (R.S.C. §2522.4[b] and [c]; Rent and Evic. Regs. §2202.7, 2202.8), or even to withdraw the building from the rental market (R.S.C. §2524.5 [a][1]; Rent and Evic. Regs. §2204.9), or to demolish the building (R.S.C. §2524.5[a][2]; Rent and Evic. Regs. §2204.8); *see also* App. A., p.6a. Thus, contrary to petitioners' claim, the issue considered premature in *Pennell v. City of San Jose*, 485 U.S. 1, is also not presented by this case. Pet. at 22-23. In *Pennell*, the regulation at issue permitted a hearing officer to reduce the regulated rent below a "reasonable return" if the higher rent would cause tenant hardship. *Id.* at 8-10. Indeed, as in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), a landlord's "primary expectation" as a lessor of residential property in New York State's heavily regulated market is not significantly limited by the challenged amendments. The amendments "not

(continued...)

be an "essential nexus" between the regulation and the "end advanced as [its] justification." *Id.* at 837. Petitioners acknowledge that the court of appeals adopted the *Nollan* nexus test as the appropriate standard by which to review petitioners' facial regulatory takings claim. Pet. at 6 and 17. The court of appeals also applied *Nollan*'s heightened scrutiny standard to evaluate the fit between the amendments and the legitimate state purpose which they are meant to serve.[9] Thus, there is no conflict between the court of appeals and this Court regarding the applicable standard of review in this case.

However, petitioners seek to manufacture a conflict by mischaracterizing the stated purpose for the challenged amendments, which was to protect families from eviction from their homes during a housing shortage, and then quibbling with the court of appeals' findings regarding the "essential nexus" between that purpose and the effects of the amendments. As demonstrated below, the court of appeals appropriately determined that the stated purpose of the amendments was to protect families related other than by blood or marriage from eviction during

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[8] (...continued)
only permit[ ] but contemplate that [petitioners] may continue to use [their] property precisely as it has been used . . . . [and] also to obtain a 'reasonable return' on their investment." *Id.* at 136. In any event, petitioners in this facial challenge have never presented a single case in which the application of the amendments has resulted in a landlord's being denied beneficial use of his or her property or a reasonable return.

[9] *Nollan* was an as applied challenge to a regulation that conditioned the grant of a building permit upon the applicant's agreeing to an easement allowing the public physical access to his property. The *Nollan* Court's discussion of the proper standard of judicial review may be limited to such physical exactions or conditioned benefits cases. In any event, the court of appeals applied *Nollan*'s heightened scrutiny standard to the amendments challenged in this case.

an ongoing housing shortage and that the amend ments directly and substantially accomplish that stated purpose.

The challenged amendments modify existing family anti-eviction regulations[10] in response to the court of appeals' decision in *Braschi*, which extended such protections under rent control to "households having all the normal familial characteristics . . . . [of] dedication, caring, and self-sacrifice . . . ." 74 N.Y.2d at 211-13. App. A, pp.4a-6a; *see* pp.1-4, *supra*. Given this regulatory history, the court of appeals appropriately concluded that D.H.C.R.'s stated purpose for promulgating the challenged amendments was, as D.H.C.R. had claimed in this action, to prevent the eviction of a narrow class of family members that had not been included in the existing family anti-eviction regulations by "clarify[ing] a non-traditional family member's right to remain in his or her home." App. A, p.5a.

The court of appeals also found that D.H.C.R.'s amendments directly served their stated purpose by cod-

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[10] Petitioners do not challenge the validity of the existing family anti-eviction regulations, which protect an expansive list of family members. *See* n.1, *supra*. Those regulations previously had been upheld by New York's courts as "effectively advanc[ing]" and "essentially accomplish[ing]" the public policy enunciated in the rent and eviction laws, *i.e.*, preventing the dislocation of resident tenant families during a housing shortage. *Festa v. Leshen*, 145 A.D.2d 49, 56-57, 62 (1st Dep't 1989), cited approvingly by the *Rent Stabilization Association* court, App. A., p.3a; *see also Cohen v. Berger*, 153 A.D.2d 920. Nor do petitioners challenge New York State's legislative findings confirming an ongoing housing shortage and reaffirming the long-standing public policy of protecting the citizens of New York State against disruptive eviction practices during this housing crisis. *See, e.g.*, 1993 N.Y. Laws, Ch. 253; Emergency Housing Rent Control Law §8581 (McKinney Uncon. 1987 and Supp. 1993); N.Y.C. Rent Control Law, Adm. Code §26-401 (McKinney Uncon. 1987); R.S.L. §26-501 (McKinney Uncon. 1987); Emergency Tenant Protection Act §8622 (McKinney Uncon. 1987). Indeed, the court of appeals particularly noted this legislative and regulatory history in determining the anti-eviction purpose underlying the challenged amendments. App. A, pp. 4a-5a.

ifying the factors previously enunciated in *Braschi*, 74 N.Y.2d at 212-13, for identifying family relationships entitled to anti-eviction protection. App. A, 4a-5a. Thus, the court of appeals concluded that the direct result of the amendments was to protect only the "intended beneficiaries" of the amendments, *i.e.*, families "who would, absent the regulations, be threatened with eviction from their homes . . . [,]" *id.* at p.14a, yet who, because of the closeness of their relationship and the length of time they had lived together, had more than made the apartment their "family home" and, thus, were equally deserving of protection from eviction.

Unlike the regulation in *Nollan*, which granted physical access to the ocean-front even to those who would suffer no harm from the proposed building, the D.H.C.R. amendments prevent the eviction only of family members who can demonstrate a close financially and emotionally committed relationship with the tenant of record, and who resided with the tenant in the apartment for the required co-residency period.[11] Nor do the

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[11] Petitioners misrepresent the heavy burden placed on family members claiming anti-eviction protections under the amendments' functional definition. Pet. at 17 n.6. The amendments, by their plain language and as they have been applied by New York courts, do not protect "practically *any* financially interdependent group of friends[,]" *id.* (emphasis in original), or "*[a]ny occupant* . . . [who] has resided in the apartment for two years or less." *Id.* at 15 (emphasis in original). Rather, the courts have required objective proof of a close financial and emotional interdependence evidencing an intention of creating a long-term committed relationship. 9 N.Y.C.R.R. §2204.6[d][3][i], §2520.6[o][2]; *see, e.g.*, cases cited by petitioners, Pet. at 23; *see also* cases in which state courts have rejected family members' claims, *Blaser v. Campbell*, N.Y.L.J., June 10, 1992, at 25, col. 1 (Civ.Ct. N.Y. Co.)(family relationship claim rejected); *Park Holding Co. v. Power*, N.Y.L.J., Jan. 17, 1992, at 26, col. 1 (App. Term, 1st Dep't)(gay life partner claim rejected on remand from 161 A.D.2d 143 [1st Dep't 1991]), *leave to appeal granted*, 584 N.Y.S.2d 506 (App. Div. 1st Dep't 1992); *Ramirez v. Lewis*, 177 A.D.2d 296 (1st Dep't 1991)(heterosexual (continued...)

amendments seek to "offset" a harm through an unrelated benefit, as did the regulation struck down in *Nollan*. Instead, the amendments directly prevent the very harm -- eviction at will from one's family home by a landlord during a housing shortage -- which justifies the imposition of the regulation upon the rental market.[12] In addition, unlike the regulation in *Nollan*, the amendments in this case go no further than absolutely necessary to protect families who meet the regulatory standards. The amendments do not affect, for example, landlords' rights under traditional real property law and the Rent Control and Rent Stabilization systems to terminate a tenancy if the tenant fails to pay rent or commits a nuisance, engages in illegal acts, or breaches the lease or some other substantial obligation of the tenancy.[13]

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[11] (...continued)
life partner claim rejected); *Parcel 242 Co. v. Heitner*, N.Y.L.J., Aug. 29, 1990, at 22, col. 2 (Civ.Ct. N.Y. Co.)("granddaughter" claim rejected); *114153 Owners v. D'Amura*, N.Y.L.J., Nov. 9, 1989, at 23, col. 2 (Civ.Ct. Kings Co.)(heterosexual life partner claim rejected).

[12] Accordingly, petitioner's claim that the amendments unfairly single out landlords to cure social ills they did not create is without merit. Pet. at 20-22. The ill the regulation addresses, dislocation of families from their family homes during a housing shortage, occurs only if the landlord -- who has voluntarily entered the regulated housing market, *see Yee*, 112 S.Ct. at 1528 -- is permitted to evict such families. As noted above, this Court has consistently upheld the right of states to limit evictions under such circumstances. *See* cases cited *supra*, pp.6-7, *e.g.*, *Block*, 256 U.S. at 154-55; *Levy*, 258 U.S. at 245; *cf. Pennell*, 485 U.S. at 22 (Scalia, J., concurring in part, dissenting in part)("Singling out landlords [for regulation] . . . may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem").

[13] R.S.C. §2524.3; E.T.P.R. §2504.2; Rent and Evic. Regs. §2104.2, §2204.2. Similarly, the landlord can commence a "personal use holdover" to regain possession of the apartment for his own or his immediate family's residential use, except where the tenant is elderly, dis- (continued...)

Petitioners further claim that the court of appeals' decision conflicts with the *Nollan* nexus requirement because the amendments do not increase the housing supply or resolve the problems of homelessness, poverty or AIDS is misplaced. Pet. at 16. As shown above, the solution of these pervasive and intractable social problems was not the stated purpose of the challenged amendments. Rather, their purpose was to extend to families related other than by blood or marriage the same protection from the hardship and suffering inflicted by eviction from one's family home during a housing shortage as was provided to families related by blood and marriage by the prior regulations. The agency had simply referenced such social problems as the context in which it had come to recognize the existence and plight of families that had not been included within the prior regulations' anti-eviction protections. *See* pp.2-4, *supra*. Petitioners did not dispute below that such families exist or that they faced summary eviction from their rent-regulated family homes on the death or departure of the tenant of record.[14]

However, the amendments were intended to protect not only families facing AIDS, homelessness or poverty; rather, they were intended to protect all families who

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[13] (...continued)
abled, or has resided in the apartment for at least 20 years, R.S.C. §2524.4(a); E.T.P.R. §2504.4(a); Rent and Evic. Regs. §§2104.5 and 2204.5. Various regulations also permit landlords to recover possession for purposes of withdrawing a unit from the rental market, R.S.C. §2524.5(a)(1); E.T.P.R. §2504.4(b); Rent and Evic. Regs. §§2104.9 and 2204.9; for purposes of demolition, R.S.C. §2524.5(a)(2), Rent and Evic. Regs. §§2104.8 and 2204.8; or on "other grounds." R.S.C. §2524.5(a)(3); E.T.P.R. §2504.4(c).

[14] *See, e.g.*, cases cited in *Braschi*, 74 N.Y.2d at 213. Indeed, the very reason petitioners challenge the amendments is because they wish to evict such family members.

can demonstrate a close emotional and financial interdependence, and the required period of co-residency in the apartment. Thus, petitioner's complaint that the amendments contain no income, AIDS, age, disability, lack of alternative housing, or any other threshold test is misplaced. Pet. at 16. Given the broad purpose of the amendments, such limitations are not required by *Nollan*. In addition, neither rent regulation itself nor the prior family anti-eviction regulations, which are not challenged by petitioners and which are premised on the same governmental purpose of protecting families from eviction during a housing shortage, have such tests. Thus, the amendments simply seek to extend to other close families the same protections which had previously been afforded only to families related by blood or marriage.[15] Contrary to petitioners' assertions, therefore, there is no conflict with *Nollan* and no basis for plenary review.

B. The State Court of Appeals' Decision Does Not Conflict With This Court's Decision In *Yee*

In *Yee*, this Court rejected a physical taking challenge to a California ordinance which imposed limitations on landlords far more severe than the definitional

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[15] This Court has consistently sustained the constitutionality of provisions of law, like the ones challenged here, with clearly defined means-end relationships. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (direct effect of saving a landmark); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987)(prevented public health hazards caused by mining); *Andrus v. Allard*, 444 U.S. 51 (1979)(protected endangered species by prohibiting unrestricted sale of parts). Indeed, the *Nollan* Court had noted that the challenged regulation in that case would have been upheld had the limitation imposed by it "protected the public's ability to see the beach [the stated governmental interest] notwithstanding construction of the new house." 483 U.S. at 836.

modifications at issue in this case. The ordinance in *Yee* permitted tenant mobile home owners to sell their homes in place on the landowner's property to "strangers" without the landlord's consent and to reap a profit from that sale.[16] Applying the settled principle that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land," 112 S.Ct. at 1528 (emphasis in original), *Yee* held:

> [The ordinance] authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners . . . . Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by government.

Id. (citation omitted). Accordingly, the *Yee* Court held that where landlords "voluntarily open their property to occupation by others, [they] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 1530 (citations omitted).

The court of appeals, relying on *Yee*, found that the challenged amendments did not coerce a landlord in the first instance to rent his or her property. Further, the court of appeals found that the challenged amendments impose an even heavier burden on persons seeking to succeed to a tenancy than is required by *Yee*. The amendments require that the successors to the tenant's lease must demonstrate a close, familial connection to

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[16] Plaintiffs in *Yee* did not challenge ordinary rent regulations, such as are at issue in this case. "Instead, their argument [was] predicated on the *unusual economic relationship* between the park owners and mobile home owners." 112 S.Ct. at 1528 (emphasis added)(citations omitted).

the tenant and a period of co-residency in the apartment. App. A., p.12a.

Nevertheless, petitioners claim that the court of appeals' decision is in conflict with *Yee* since landlords "cannot unilaterally decide to go out of the rental business, but instead must meet specified statutory criteria before they can evict their tenants and withdraw their properties from the rental market." Pet. at 25-26. However, the *Yee* Court rejected this very argument in the landlords' facial challenge in that case:

> Petitioners suggest that the statutory procedure for changing the use of a mobile home park is in practice "a kind of gauntlet," in that they are not in fact free to change the use of their land. Because petitioners do not claim to have run that gauntlet, however, this case provides no occasion to consider how that procedure has been applied to petitioner's property, and we accordingly confine ourselves to the face of the statute.

112 S.Ct. at 1528-29 (citations omitted). Similarly, in this facial challenge, petitioners do not claim to have pursued the numerous opportunities under the statutory scheme for terminating tenancies or changing the uses of their properties.[17] Thus, the amendments protecting fam-

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[17] *See* n.13, *supra*. On similar grounds, the *Yee* Court found that an as applied regulatory taking claim was not ripe since the landlords did not claim that the regulations at issue in that case had been applied to the landlords' property, depriving them of its economically beneficial use. *Yee*, 112 S.Ct. at 1531-32. Here, too, petitioners' facial challenge does not allege any application of the amendments to their property or any constitutionally prohibited economic harm. *See* n.8, *supra*. Thus, petitioners' reliance on *dicta* in *Yee*, which is arguably applicable to an as applied regulatory takings claim, is misplaced in this facial challenge. Pet. at 15-16. In addition, their reliance on the concurrence's comments in the decision below regarding future as applied challenges is also misplaced in this facial challenge. Pet. at 11.

ilies from eviction do not "on their face . . . compel a landowner over objection to rent his property [in the first instance] or to refrain in perpetuity from terminating a lease." *Id.* at 1529.[18]

Accordingly, there is no conflict between the decision of the New York State Court of Appeals in this case and the decision of this Court in *Yee*.

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[18] Petitioners' reliance on regulatory provisions that protect elderly and disabled tenants, or tenants who have resided in an apartment for at least twenty years or more, from being evicted solely for the owner's use is unavailing. Pet. at 25-26. Those provisions, which pre-date the challenged amendments, were not challenged below. In any event, they do not create a tenancy "in perpetuity," but merely protect the tenancy for the life of the protected tenant. Nor is the landlord prohibited from terminating the tenancy of such persons on any of the numerous other bases provided for in the statutory schemes. See n.13, *supra*.

CONCLUSION

For the reasons stated above, the petition should be denied.

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